

**Consideration of objections with respect to Findings of Fact and
Conclusions of Law with Nonfinal Order in the matter of *Walthers v.
DNR*, Administrative Cause No. 13-147W**

- **Finding of Fact and Conclusions of Law with Nonfinal Order (issued on March 7, 2016)**
- **Written Objections received from Paul Walthers on March 24, 2016, for which service was perfected on March 30, 2016 by Petitioner's daughter, Lisa Walthers**
- **Respondent DNR's Motion to Strike Petitioner's Untimely Filed Written Objections**
- **Order on Respondent DNR's Motion to Strike Petitioner's Untimely Filed Written Objections**

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

PAUL WALTHERS)	
Petitioner,)	Administrative Cause
)	Number: 13-147W
vs.)	
)	
)	
DEPARTMENT OF NATURAL RESOURCES)	
Respondent.)	(VTS-DM-3951)

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH NONFINAL ORDER**

Statement of the Proceeding

- 1 On August 31, 2013, Paul Walthers ("Walthers") and Ronald Richards and Carolyn Richards ("Richards")¹ filed correspondence with the Natural Resources Commission ("*the Commission*") requesting an administrative review of Notice of Violation number VTS-DM-3951 ("NOV"), issued to Walthers and Richards by the Department of Natural Resources ("DNR").
- 2 Correspondence filed by Walthers and Richards avers that DNR issued an NOV to Walthers and Richards for "an alleged violation of Indiana Code (I.C.) 14-27-7.5...." and that Walthers and Richards "allege and contend that the basis and the engineering determination upon which the NOV was issued for Forest Lake Dam #32-17 is incorrect."
- 3 Indiana Code ("IC") 14-25.5 provides the authority to DNR to issue a NOV for the enforcement of IC 14-27, as relevant to this proceeding. *IC 14-25.5-1-1.*
- 4 The NOV, issued by the DNR Division of Water, was attached to the Petitioners' correspondence and is dated August 22, 2013. DNR alleges, within the NOV, that Walthers and Richards violated IC 14-27-7.5 *et seq.*, commonly known as the "Dam Safety Act", pertaining to the regulation and classification of dams. The NOV states the following as the Nature of the Violation:

¹ The Richards withdrew their request for administrative review prior to hearing. While some information regarding the Richards is included and relevant to this decision, Walthers is the sole remaining Petitioner.

Forest Lake Dam is a high hazard dam (State Identification #32-17), and is located in Section 10, Township 15N, Range 1E, showing on the Brownsburg Quadrangle map, and within Hendricks County.

A dam owner is required by Indiana Code (I.C.) 14-27-7.5 to keep the structure (dam) maintained in a safe condition by the exercise of prudence, due regard for life and property, and the application of sound and accepted technical principles.

Findings:

The owners of the Forest Lake Dam are Paul R. Walthers, and Ronald D & Carolyn Richards.

The Forest Lake Dam is an unsafe, unauthorized dam. There is no record of a permit issued for this dam or as-built engineering plans proving the structure was properly designed and constructed. A high hazard inspection report has not been received for the structure as required by I.C. 14-27-7.5.

The owners of the Forest Lake Dam have failed to maintain and keep the structure in the state of repair and operating condition required by the exercise of prudence, due regard for life and property, and the application of sound and accepted engineering principles which is a violation of Indiana Code 14-27-7.5.

The owners have not complied with the recommendations of the February 23, 2013 letter which asked that the owners to complete a series of scheduled actions including retaining registered professional engineer experienced in dam design, performing high hazard inspection reports and submitting such reports to DNR. Also requested was a lowering of the lake to safer level until safety deficiencies could be resolved. These actions and the failures to act are violations of Indiana Code 14-27-7.5.

- 5 NOV's issued pursuant to IC 14-25.5, are addressed procedurally by IC 4-21.5-3-6, and become effective unless a person timely requests administrative review under the Administrative Orders and Procedures Act, commonly referred to as "AOPA". *IC 14-25.5-2-4 and IC 14-25.5-2-5.*
- 6 The correspondence filed by Walthers and Richards timely initiated administrative review under AOPA and the administrative rules adopted by the Commission at 312 IAC 3-1 to assist with the implementation of AOPA. *IC 14-10-2-3.*
- 7 The Commission is the "ultimate authority" with respect to the subject matter of the instant proceeding and it has adopted rules at 312 IAC 10.5 to assist with the administration of the Dam Safety Act. *IC 4-21.5-1-15 and 312 IAC 3-1-2.*
- 8 The Commission has jurisdiction over the subject matter of this proceeding and over the persons of the parties.

- 9 The Commission's Administrative Law Judge ("ALJ"), Stephen Lucas, was appointed and assigned the proceeding. Following the retirement of ALJ Lucas, ALJ Dawn Wilson accepted the appointment and assignment of this case as a substitute qualified ALJ. *IC 14-10-2-2*.
- 10 DNR was represented throughout the proceeding and was represented by Attorney Sean Wooding at the administrative hearing.
- 11 The Richards were represented by John Mervilde and Nicholas Gahl. The Richards were no longer parties to this matter when the administrative hearing was heard.
- 12 Walthers was self-represented throughout the proceeding.
- 13 Following the issuance of notice to Walthers, Richards, and DNR, ALJ Lucas conducted a prehearing conference on October 2, 2013, in Indianapolis, Indiana. The *Report of Initial Prehearing Conference and Notice of Second Prehearing Conference*, dated October 3, 2013, records a summary of the events that occurred during the prehearing conference. ALJ Lucas ordered DNR to file a statement of contentions by November 18, 2013. The Petitioners², were each ordered to file and serve their statements of contention by December 18, 2013, including any applicable affirmative defense.³
- 14 DNR filed a statement of contentions on November 18, 2013. The statement alleged specific violations on which DNR based its NOV.
- 15 Walthers filed a response to DNR's statement of contentions on December 16, 2013, but no statement of contentions. Walthers asserted in his response to DNR's statement of contentions:
 - a "IC 14-27-7.5-1 specifically states that the chapter does not apply to properties such as Lake Forest."
 - b Walthers states he "became a lake dweller in 1966 and purchased the lake and dam properties in 1972. ... When the lake was first developed no water entered the property from the north of the railroad and Highway 36. The watershed was less than a half square mile. Over the years, the state and county agencies' programs diverted watershed into Lake Forest." He asserted that it is "against the law to change the natural watershed to a neighbor's property and thereby cause said neighbor to have problems." He asserted that the consensus of three Indiana

² The Petitioners are also referred to as the Claimants throughout this proceeding.

³ The parties were advised of AOPA's prohibition against *ex parte* communication with the ALJ within the September 5, 2014, written notice setting the prehearing conference, orally during the prehearing conference and in the ALJ's order summary of the prehearing conference. On August 4, 2015, following *ex parte* communication by Walthers to the ALJ, the communication was disclosed and distributed as required by IC 4-21.5-3-11(e). On August 13, 2015, following *ex parte* communications by Lisa Walthers, two additional disclosures with distribution were made by the ALJ, as required by IC 4-21.5-3-11(e).

- Legislators and numerous Hendricks County government officials is that if DNR declares the dam is a high hazard problem, "the DNR should fix it."
- c Walthers acknowledged that he was informed, in writing, that the dam was classified as a high hazard dam in 2003. However, Walthers asserts that the "risk of damage to the dam and adjoining lake properties is very minimal."
- 16 The issues were assigned to mediation on January 14, 2014. A *Mediator's Report* was filed stating that the parties met and mediated on February 24, 2014. The mediator's report stated that mediation did not result in agreement but that the parties requested additional time to further explore settlement options.
- 17 On July 23, 2015, a status conference was heard, following the filing of status updates by the parties, as requested by the ALJ. Thereafter, the following prehearing orders were issued by order dated July 24, 2015:
- a The parties were ordered to exchange Preliminary Witness and Exhibit Lists on or before August 27, 2015.
- b Discovery was to be completed on or before October 1, 2015.
- c The parties were ordered to exchange and file Final Witness and Exhibit lists on or before October 13, 2015.
- d A Final Status Conference was set for October 26, 2015.
- e An administrative hearing was scheduled to be heard on November 9, 2015.
- 18 Upon motion by Richards, prehearing deadlines were extended and the hearing date was vacated to allow the parties the opportunity to discuss settlement. The date originally set for a Final Status Conference was converted to a Second Status Conference and the Final Status Conference was reset to be heard on December 15, 2015.
- 19 During the Second Status Conference on October 26, 2015:
- a The discovery deadline was extended to November 16, 2015.
- b The deadline to exchange Final Witness and Exhibit lists and to file the Final Witness and Exhibit List with the ALJ was expanded to include an exchange of all potential exhibits between the parties by December 1, 2015. The prehearing order states, "Any exhibit not exchanged may be excluded from consideration at a hearing, upon objection by any party, at the discretion of the ALJ."
- c The hearing was reset to be heard on February 8, 2016.
- 20 On November 17, 2015, having resolved matters through settlement, DNR and Richards filed an *Agreed Settlement and Stipulation of Dismissal*.⁴ The ALJ issued a *Final Order of Dismissal as to Ronald and Carolyn Richards* on November 18, 2015.

⁴ The *Agreed Settlement and Stipulation of Dismissal* states "Ronald and Carolyn Richards (Richards) and the Department of Natural Resources (DNR) hereby agree and stipulate to the dismissal of the Richards from this administrative action, with prejudice, as well as from any further action relating to the underlying Notice of Violation dated August 22, 2013 (VTS-DM-3951) and the purported regulated structure. Richards and DNR have resolved these matters via settlement."

- 21 On December 1, 2015, DNR and Walthers each filed witness and exhibit lists.
- 22 On December 15, 2015, during the Final Status Conference:
 - a DNR asserted that no potential exhibits had been received from Walthers. Walthers did not dispute DNR's assertion. Yet again, the ALJ ordered Walthers to provide his potential exhibits to DNR and set an additional deadline, December 28, 2015.
 - b The ALJ granted DNR's request for a more specific delineation of witnesses in Walthers' witness and exhibit list for potential witnesses identified as "lake dwellers" and "forthcoming experts."
 - c DNR also advised that numerous Interrogatories were received from Walthers on November 16, 2015, and requested additional time to respond to the request. DNR's request was granted.
 - d To allow Walther's an opportunity to review DNR's Interrogatory responses, Walthers was allowed to file an appropriate amended witness and exhibit list before January 21, 2016.
 - e A Supplemental Final Status Conference was set for January 29, 2016.
 - f The hearing date, February 8, 2016, remained unchanged.
- 23 On January 12, 2016, an email from Lisa Walthers was received by the ALJ requesting a meeting to discuss the settlement terms between DNR and Richards. On January 14, 2016, an *Order Denying Petitioner's Request to Meet* with the ALJ was issued.
- 24 On January 29, 2016, a Supplemental Final Status Conference was heard:
 - a DNR asserted that Walthers had not provided any potential exhibits to DNR. Walthers confirmed DNR's assertion to be true. The ALJ informed Walthers orally and in the written summary of the conference that his disregard of the ALJ's prior orders regarding the exchange of potential exhibits could prevent the admission of documents that he might offer at hearing.
 - b DNR reported that it had received an amended witness and exhibit list from Walthers. The amended list was not filed with the Commission, contrary to the ALJ's order.
- 25 On February 8 and 9, 2016, Walthers and DNR attended the administrative hearing, in Indianapolis, Indiana. Walthers appeared, self-represented, who was accompanied by his daughter, Lisa Walthers. DNR appeared by counsel, Sean Wooding, who was accompanied by DNR Attorney Ed Harcourt and Jon Eggen, DNR's Division of Water, Compliance and Enforcement Manager.

Findings of Fact⁵-DNR Jurisdiction to Regulate Forest Lake Dam

- 26 Walthers challenges DNR's jurisdiction to regulate Forest Lake Dam.

⁵ Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

- 27 Jon Eggen (“Eggen”) has been the Manager of the Compliance and Enforcement Section of the DNR Division of Water since 2007. Eggen conducts inspections, supervises inspections, reviews documents and drafts warning letters and violations, including required time frames and optional mitigation, if applicable. See testimony of Eggen.
- 28 A stream runs to and through Forest Lake. See testimony of Eggen.
- 29 DNR claims jurisdiction over dams that have at least one of three criteria. One criterion is that the dam has a drainage area that exceeds one square mile. The second is when a dam is at least 20 feet in height. The third is when the structure impounds at least 100 acre feet of water.
- 30 Susie Delay (“Delay”) is a Hydraulic Engineer in the Compliance and Enforcement Section of the DNR Division of Water. Delay has worked for DNR for 20 years, with over two years in her current capacity. In her position, Delay performs inspections for potential and ongoing violations and she prepares engineering documentation for all active violations including computer modeling and calculations for dam safety. Delay calculates breach assessments to determine the impact of a catastrophic dam failure on structures downstream, including residential, commercial and bridges. Her calculations concerning that impact are used by DNR in hazard determinations. See testimony of Delay and Eggen.
- 31 Delay determined the height of the structure to be 19 feet, calculated at the top of the dam, Delay determined the volume of water impounded to be 55 acre feet. See testimony of Delay and Exhibit H⁶.
- 32 DNR is not claiming jurisdiction over the dam based on the height of the dam or the volume of the impoundment. See testimony of Knipe.
- 33 DNR rests its authority to regulate the Forest Lake Dam on its determination that the drainage area of Forest Lake Dam is more than one square mile. See testimony of Knipe.
- 34 David Knipe is the Engineering Section Manager, for the Central Basin Team for DNR’s Division of Water. Knipe has been with DNR for over 24 years. Knipe manages engineering functions within the Division of Water, including flood plain mapping and hydraulics. See testimony of Knipe.
- 35 On behalf of DNR, Knipe calculated the drainage area above the Forest Lake Dam. Knipe conducted his analysis by using “ArcHydro” software, an ArcGIS mapping program and StreamStats, an online product available to the general public through the United States Geological Survey (USGS) website. With these products, he reviewed “one foot contour mapping” that he obtained from Hendricks County

⁶ DNR’s exhibits are identified by letters. Petitioner Walthers’ exhibits are identified by numbers.

records and subdivision plans for the upper end of the watershed. See testimony of Knipe.

- 36 Knipe performed an analysis and determined which way water flows in the area above the dam. He then concluded that the watershed, or drainage area, is approximately 1.23 square miles. See Testimony of Knipe, Eggen and Exhibits F and G.
- 37 Walthers refuted the conclusions reached by Knipe by producing maps indicating watershed areas of less than one square mile for an area above Forest Lake. However, the drainage areas addressed by those maps begin at a point upstream of the lake and do not include the area of Forest Lake itself. See testimony of Walthers, Eggen and Exhibits 1 and 2.
- 38 ALJ finds that the drainage area of Forest Lake is approximately 1.23 square miles.
- 39 Walthers argues that growth in Hendricks County, and specifically Avon, has increased the "watershed" of Forest Lake. Walthers's offers no evidence to support a change in the area of the watershed⁷. See testimony of Walthers.

Findings of Fact- NOV basis: High Hazard Classification & Inspection Reports

- 40 Within Walther's response to DNR's statement of contentions Walthers states that he received a letter from DNR identifying the Forest Lake Dam as "high hazard" in 2003. No evidence of this notification was provided by either party. Walthers now requests reconsideration of the Forest Lake Dam classification as a high hazard dam.
- 41 In 2004, DNR staff informed Walthers that Soliman Sherkawi, Engineering Geologist informed Walthers that the Forest Lake Dam was classified as a "significant hazard dam." When Walthers was asked if there was any "new development downstream, he said that there is a road and a bridge under it." It is unclear from the evidence whether the hazard classification reported by DNR indicated a change from the initial high hazard classification or if the determination was based on the information provided by Walthers, which omitted disclosure of the subdivision. See Exhibit 7.
- 42 Dam hazard classifications change over time, depending on what is found to be downstream of the dam. See testimony of Eggen and Exhibit 7.
- 43 Delay determined a breach assessment for the Forest Lake Dam. She analyzed best available data and established hazard calculations, based on a catastrophic breach of Forest Lake Dam on a sunny day. Her determinations were based on sunny day breach calculations so as to consider only the water potentially impounded by the

⁷ Walthers asserted that the watershed has increased but a reasonable conclusion is that Walthers assertion related to an increase in the *volume* of water within the watershed, not the *area* of the watershed, due to development above the dam.

dam, without additional water from rain. Based on the height of the dam and the volume of the impoundment at the top of the dam, Delay established a total dam break breach discharge to be "5037 cfs". See testimony of Delay and Exhibit H.

- 44 Delay then calculated the impact of such a failure downstream, based on the surface elevations within the "maximum breach inundation area". She captured water surface elevations to establish a flow path at various cross sections on the map identified as Exhibit H. As she expected, her calculations revealed lower water surface elevations further from the breach point. Based on her calculations, she determined the breach inundation area included a county road and structures, specifically homes, and found that some homes were above breach elevation. She determined that 29 homes were within the breach inundation area, with 12 having the home's lowest adjacent grade at least one foot below the elevation, or a flood depth of over one foot, inside those structures. Her determinations are based on her mathematical calculations of the best available information, not utilization of software. See testimony of Delay and Exhibit H.
- 45 Delay determined, based on her calculations and analysis, that Forest Lake Dam should be classified as a high hazard structure. See testimony of Delay and Exhibit H, page 2.
- 46 Walthers does not believe that the dam is a high hazard dam because the volume of water in the lake would not create an actual threat to life and property downstream. To support his assertion, Walthers reports that there is quite a bit of sediment in the lake. In addition, he measured the depth of the lake at various points on the lake from a boat. He acknowledges that his measurements are "not all that accurate", but he believes that the depth would not create a danger downstream. See testimony of Walthers.
- 47 It is noted that Delay's calculations are based, in part, on the height of the dam and the potential impoundment of the lake. Walthers's calculation is based on the water level at various points on the lake on a specific but undisclosed date. A maximum breach inundation area, as defined by 312 IAC 10.5-2-7 includes an uncontrolled release of a dam's contents when "the impoundment is at maximum design pool elevation." Delay's calculations would be the appropriate figures to use when calculating the impacted area below the dam. 312 IAC 10.5-2-7.
- 48 Walthers argues that the Forest Lake Dam should not be designated as a high hazard dam because he believes DNR approved downstream residences in the neighborhood of Thornridge. Walthers argument is not supported by the facts. See testimony of Walthers and Exhibit 3.
- 49 To support his contention, Walthers submitted a DNR permit from 1995, for construction activities within the floodway consisting of "two 14" diameter storm sewer outfall pipes with with metal end sections, and approximately 30 linear feet of a grass swale with 4:1 side slopes." The permit also included a reference to riprap to

be placed at the base of the outlets for energy dissipation. The permit states that the residential subdivision would be developed landward of the floodway except portions of Lots 13, 14 and 15. The permit applicant was "Thornridge, Inc." See Exhibit 3.

- 50 DNR's authority under the Flood Protection Act includes the authority to issue permits for construction in a floodway, here the unnamed tributary to White Lick Creek. A DNR memorandum, dated April 7, 1995, states that plans for the project proposed would not "decrease the cross-section flow area of the stream." The locations of the houses within the Thornridge subdivision are not in the floodway and were not included in the permit issued by DNR. See testimony of Eggen and Exhibit 3.
- 51 The ALJ finds that Walthers' evidence does not support his contention that DNR approved the Thornridge subdivision. The ALJ also finds that a DNR permit approval does not equate to approval of the underlying project for which a permit is requested.
- 52 George Crosby ("Crosby") is the Manager of Dam and Levee Safety Section for DNR and has been in his current position for over 25 years. He possesses a Master's Degree in Engineering Geology from Purdue. See testimony of Crosby.
- 53 While DNR's dam safety program began in the early 1960s, Crosby recalls that there were changes to the law in 2002 which thereafter, required high hazard dam owners to file reports. See testimony of Crosby.
- 54 Ken Smith ("Smith") is a Civil Engineer and the Assistant Director of the DNR Division of Water, with over 39 years of experience with DNR. Smith currently oversees four sections, (1) enforcement, (2) surveying, (3) project development and (4) dam safety. See testimony of Smith.
- 55 Smith participated in a site visit of Forest Lake Dam prior to issuance of the NOV. He determined that one basis for the NOV issued was that the owners had not submitted the reports required for a high hazard dam reflecting the owner's engineer's inspection findings. See testimony of Smith.
- 56 On the date of the administrative hearing, none of the required inspection reports had been submitted by Walthers. No contrary evidence was presented that alleged inspection reports had been filed by Walthers. See testimony of Smith.

Findings of Fact - NOV basis: State of Repair/Operating Condition

- 57 Walthers estimates that Forest Lake Dam was built 75 years ago. See testimony of Walthers.
- 58 Walthers was a "caretaker" of the dam for 50 years and was engaged in "taking care of the litter", including the removal of leaves, tree limbs and other debris. He

acknowledges he placed sandbags at the primary spillway but asserts the placement was designed to be temporary. See testimony of Walthers and Exhibit D.

- 59 Walthers acknowledges that he has not actively cared for the dam since 2013. See testimony of Walthers.
- 60 Crosby estimates that Forest Lake Dam was built over 50 years ago and that its design and construction were not originally permitted by DNR or its predecessor. See testimony of Crosby.
- 61 Since the construction of Forest Lake Dam, there have been no DNR permits issued to authorize alterations to the dam, such as observed changes to the principle spillway and the placement of fill in the abutment zone of the dam. See testimony of Crosby and Exhibit J-17.
- 62 Walthers acknowledges that he has made alterations to the structure and has “worked hard” to eliminate erosion. He constructed a retaining wall to keep the water from traveling down the road and washing out the bridge. Walthers made alterations to the dam because he observed an increase in water flow into his lake from the Town of Avon. Over time, he has had as many as 10 engineers on the dam. However, when making various alterations to the dam, Walthers did not use plans developed by one or more engineers. See testimony of Walthers.
- 63 Walthers states that he has built several subdivisions and has a general science degree from Purdue, as well as other master’s degrees in undisclosed disciplines. Walthers is not a licensed engineer but he claims to possess information and experience concerning “how things work” and he believes that engineering specifically related to dams is “not all that complicated”. While a couple of engineers live on the dam, Walthers reports that “we are not licensed super hydraulics experts, no we’re..., none of us.” See testimony of Walthers.
- 64 Crosby’s perspective of dam safety generally is that it is a multi-disciplinary science. Crosby oversees technical elements of the creation of new dams by working with the professional engineering teams hired by property owners, in the areas of site selection, planning and construction. Crosby ensures adequate supervision by a design engineer for construction permits. Once built, Crosby and his staff regulate dam maintenance and repairs, including the permitting of dam alterations. Crosby involves himself with the long term management of structures throughout the life of Indiana dams. For dams classified as high hazard, he reviews high hazard dam reports that are submitted, as required, every two years by the owners of high hazard dams. Crosby also acts as a general advisor to others, including other agencies, for issues involving dam safety. See testimony of Crosby.
- 65 Crosby asserts that, while all dams have some risk of failure, with proper upkeep and maintenance, dams can maintain an acceptable level of safety. The purpose of good engineering design, construction and maintenance is to reduce risk. Crosby analogizes

an improperly designed, constructed and maintained dam to a bus with bad brakes and tires. "Not all busses with bad brakes and tires will crash but there is an elevated risk of a safety problem." The standards required by DNR are minimally acceptable safety standards. While DNR regulates dams, dam owners are responsible to control and safely impound the water, and owners may choose higher standards than those required by DNR. See testimony of Crosby.

- 66 Delay conducted site visits and inspections of the Forest Lake Dam on several occasions. Every time she was there, she observed something that caused her concern and she expressed these concerns to her supervisors. See Testimony of Delay and Exhibit I.
- 67 Eggen observed the site of the Forest Lake Dam prior to the issuance of the NOV. He took photographs at the site to capture his observations of the general condition of the site. Eggen observed sandbags placed at the primary spillway raising the elevation of the lake. He also observed a structure within the lake that provided for drainage. Downstream from the lake, he saw a road and residences in a subdivision across the road. After the site visit, he reached a conclusion based on his observations that the dam was in violation, because it was in disrepair, alterations had not been properly completed and that the dam presented potential safety concerns downstream. His conclusions resulted in the issuance of a warning letter on February 28, 2013, to Walthers concerning noncompliance in the care of the dam. In the correspondence, he included corrective measures that were recommended by DNR. See testimony of Eggen and Exhibit B and D.
- 68 Crosby and Delay conducted a site visit of the Forest Lake Dam on May 15, 2013. Crosby took photographs of items that concerned him about the "extremely poor maintenance and apparent multiple unauthorized modifications to the structure...." Specifically, on May 15, 2013, Crosby observed what he determined to be "serious issues" and deficiencies with the embankment, the primary spillway and the auxiliary spillway. See testimony of Crosby and Exhibit J-1.
- a Crosby observed the following deficiencies in the embankment:
- i) Large trees are on the crest of the dam's embankment. The roots of living trees will break down soils that should be compacted and seek out the water tables. When trees die, their decaying roots will create flow paths for water and create voids in the dam, substantially weakening the strength of the dam. Also trees may be downed in a windstorm and may remove huge portions of the embankment of the dam. Trees also inhibit the proper inspection of a dam, in that trees prevent the ability to "sight across" and inspect for bulges that indicate potential problems.
 - ii) An unauthorized utility shed is seen on the embankment. The placement of the shed is unacceptable because it prohibits inspection under the shed, it attracts animals to reside and burrow into the soils of the dam and it increases shedding of water in a rainstorm in a concentrated area.
 - iii) Crosby observed uncompacted and potentially unstable fill on the downhill slopes as well as erosion, voids and depressions on the slopes.

- iv) Crosby observed buried and partially buried pipes in the embankment and noted water flowing outside a discharge pipe adjacent to the principle spillway, indicating internal erosion in the structure.

See the testimony of Crosby and Exhibit J-1, J-5, J-12, J-17, Exhibit K.

- b Crosby observed serious deficiencies with the design and maintenance of the principle spillway of the Forest Lake Dam.

- i) Crosby found that the location was not well suited for the open chute principle spillway found at Forest Lake Dam. He also observed that the open spillway system was not properly designed, in that it was built over manmade fill, and the spillway system was undersized. An appropriate design would include a closed large concrete box riser with an appropriate "trash rack" connected to a concrete box with seepage control features. An adequate design for an open chute principle spillway would include concrete slabs for the floor, a vertical retaining wall, a cut off wall and subsurface drains downstream for seepage control. None of those features appear in this dam, which resulted in erosion of the embankment, a sinkhole and weakening of the integrity of the dam. The inappropriate and inadequate design creates a risk of breach.

- ii) He also observed poor maintenance through cracks, missing rocks, and extensive erosion. He observed small and large voids providing dangerous flow paths for internal erosion. In addition, he found that the sides above the stilling basin of the primary spillway were nearly vertical and he observed that it had been patched together on numerous occasions. He observed erosion in this area and attempted repairs that did not appear stable.

- iii) At the primary spillway, Crosby observed seepage at the end of a pipe indicating seepage from the collars and around the outside of the pipe, which causes internal erosion along the outside of the pipe. Walthers was not present when the photographs were taken but he denies that the photographs show water running outside the pipe. Walthers believes water in the photographs is running through the pipe, not around the pipe and is coming from the pipe in the lake. Crosby observed no water was entering the pipe in the lake on the day he took the photos. The photographs show water flowing out of the pipe as well as around the outside of the pipe. It is unclear from the photograph within the lake whether there is water flowing into the pipe from the lake. Uncontrolled seepage creates a safety issue because, as the water over the years saturates the soils, added pressure results which undermines the integrity of the dam. A properly designed dam would include appropriate subsurface controls to pick up the seepage and discharge it at points that can be monitored over the life of the structure. The Forest Lake Dam seepage, over time, will impact the integrity of the dam.

See testimony of Walthers, Crosby and Exhibit J-1, J-3, J-4, J-6, J-7, J-8, J-9, J-10, J-11, J-12, J-18, J-20.

- c Also on May 15, 2013, Crosby observed serious unauthorized, improper alterations and deficiencies regarding the auxiliary spillway, also commonly referred to as an emergency spillway.

- i) He observed the addition of a concrete wall, reducing the capacity of the spillway system by blocking water flow.
- ii) Crosby observed damage to the spillway outlet with “cobbled” repair attempts from too frequent operation of the spillway. Crosby observed that fill had been added to the right abutment. It is unusual that the addition of soil would be needed and Crosby determined that the addition would require a permit to ensure it had been done as the owner and the owner’s engineer recommended and as the alteration had been approved.
- iii) Crosby observed and photographed a view of the inlet for the emergency spillway showing concrete blocks, debris and a pontoon close enough to the inlet to block the spillway reducing capacity. In addition, he saw that there is no cut off wall in the area creating a risk for water to flow under the slab.

See testimony of Crosby and Exhibit J-17, J-18, J-19, J-20.

69 Crosby prepared a report of the deficiencies that he observed. He summarized the deficiencies in a report and determined that “the dam and spillway have serious safety deficiencies and with time these problems will continue to worsen and threaten the integrity of the structure.” See testimony of Crosby and Exhibit J-1.

70 Exhibit K includes an additional summary of deficiencies in Forest Lake Dam. See Exhibit K.

71 Smith determined that a basis for the NOV was that owners of the dam are responsible to maintain their dam in a safe state of repair. Based on his own observations and the reports from his staff with expertise in modeling and dam safety, he determined that the structure known as Forest Lake Dam had multiple serious deficiencies. See testimony of Smith.

72 Based on their education, experience and observations of the Forest Lake Dam over time, Crosby and Smith concluded that the Forest Lake Dam was not sufficiently strong; not maintained in a good and sufficient state of repair or operating condition; not designed to remain safe during infrequent loading events and unsafe; and dangerous to life and property, in accordance with the requirements found in IC 14-27-7.5-11. Based on information he personally gathered and information gathered by his staff, Eggen drafted NOV number VTS-DM-3951 and it was issued by DNR on August 22, 2013. See testimony of Eggen, Smith and Exhibit A.

73 Following the initiation of this proceeding, as a mitigation effort, Walthers put in a siphon system and some pipes. He also removed collars on the draw down structures in the lake. Those efforts are no longer functioning in that, at some later time, the collars and rigs were put back on the drain. See testimony of Smith.

74 Following the issuance of the NOV, Crosby conducted a site visit in July of 2015 and prepared an Emergency Log to document an event. The site visit followed the report of a major incident or emergency and revealed that the dam was in a state of progressive failure. Crosby predicted during his site visit memorandum in 2013, “The

grouted principle spillway chute is seriously deficient and a probable location of where a breach of the dam could initiate. . . .” In 2015, the principle spillway had failed and a “good portion” of the principle spillway chute was gone. See testimony of Crosby and Exhibit E.

75 The Richards worked with their “owner engineer”, Ross Holoway, a private professional engineer, who sent an email on July 10, 2015, stating, “The dam was in active failure with severe damage to the principle spillway.” See testimony of Crosby and Exhibit E, pages 6 and 13, and J-1.

76 Smith and Crosby concur that Forest Lake Dam is in a progressive state of failure. See testimony of Crosby and Smith.

77 In 2015, Smith met with Walthers, the Richards,⁸ and the Richards’ professional engineer. A discussion concerning mitigation occurred so that the conditions seen on that day could be addressed due to impending rain. Lowering the water was stressed by the Richards’ engineer. Toward this end, Walthers removed two sections of the drawdown pipe in the lake to assist with the lowering of the lake. While minimal temporary measures were taken by Walthers at that time, the underlying violations have not been resolved. Contrary to Walthers’ desires, the Richards’ professional engineer worked with a contractor to alter the auxiliary spillway in order to reduce pressure on the primary spillway. See testimony of Smith and Exhibit E.

78 Forest Lake Dam was not properly designed or constructed and has not been appropriately maintained, which has resulted in placing people at risk downstream. Crosby asserted during the administrative hearing that Forest Lake Dam, in its current state, should be redesigned and reconstructed or decommissioned. See testimony of Crosby.

79 Smith determined that, with appropriate permits, the lake could be placed at a low water level, which would allow permitted redesign and reconstruction to occur. In recognition of the ongoing expenses of dam maintenance, an alternative would be for the dam to be decommissioned, a onetime cost. Decommissioning may be the least costly alternative. See testimony of Smith.

80 Crosby has observed that long term dam upkeep is expensive and commonly the costs associated with ownership are often spread out through mechanisms such as dam ownership by an association. See testimony of Crosby.

81 Crosby has determined that, if 2016 has a wet spring, it is not unlikely that Forest Lake Dam will experience a breach. Upon a breach, there is a high likelihood that an uncontrolled discharge would result in serious consequences downstream. Consequences could include a reduction in the values of downstream properties, property damage, as well as other consequences. Short of a full breach, in the event of an additional emergency event, people downstream may need to be evacuated,

⁸ The Richards were parties to this proceeding at the time.

resulting in relocation costs. While the dam has not yet breached, the dam is in a progressive state of failure. See testimony of Crosby.

Findings of Fact-Walthers as appropriate NOV recipient

- 82 Walthers acknowledges that he owns 6.8 acres in Hendricks County, Indiana. He estimates his ownership interests encompass approximately 90% of the Forest Lake Dam structure, including the primary and auxiliary spillways for the dam, as well as the lake bed of Forest Lake. Walthers formerly owned but has now sold a residence that was on or near the lake. See testimony of Walthers.
- 83 Walthers states that the DNR “demand”, to rebuild the dam, is something he cannot afford. Decommissioning the lake is also cost prohibitive and he will require a court order to take that action, as lake dwellers, whose property values fall, and individuals whose wells are impacted, will consider litigation. He does not want to be in the position of being the one who makes changes to the dam. Walthers has neighbors who will hold him responsible for consequences of dewatering the dam. Walthers concluded, without a supporting basis for his conclusion, that DNR must decommission the dam and own the impact of the resultant changes. See testimony of Walthers.
- 84 Walthers believes that owners should take care of their property and that a dam owner should be responsible for a dam they own, with qualifications. He claims interference above and below the dam.
- a Above the dam, he claims that the State of Indiana, Hendricks County, the town of Avon, the highway department and factories have interfered. See testimony of Walthers.
 - i) Walthers believes that interference came in the form of increased storm water flowing into Forest Lake. Walthers asserts that if Hendricks County and the town of Avon, had not grown and added schools and subdivisions, and widened state highways, his “farm pond” and “dam” would have had few changes in the last 50 years. Walthers presented no evidence of his assertion, except for his personal observations and perceptions that the water flowing into Forest Lake has increased over time. See testimony of Walthers.
 - ii) Walthers presents the question, “How can your office and the state of Indiana hold an individual responsible for an increase in surface water drainage of which I have no control? I feel my property rights, my civil rights and due processes are being aggressively violated by the Indiana Department of Natural Resource”. See testimony of Walthers.
 - iii) Eggen reports that DNR has no authority to regulate the volume of surface water entering the watershed of Forest Lake. See testimony of Eggen.
 - b Below the dam, Walthers claims interference through the approval of the subdivision of Thornridge. See testimony of Walthers and Exhibit 3.
 - i) DNR did not approve the residences within Thornridge. See testimony of Eggen and Exhibit 3.

- ii) Walthers presented insufficient evidence of any other Thornridge approval that he determined would constitute “interference” with his property.
- c Walthers presented insufficient evidence of other actions, which he determined to be “interference” with his property.

85 Anecdotally, Walthers argued at the administrative hearing that there are other owners of Forest Lake Dam, the Richards. In fact, those owners were identified on the NOV at issue in this administrative cause. The Richards withdrew their request to contest the NOV. Walthers continues to contest the NOV but indicated his desire to “have the same deal”. See testimony of Walthers.

86 Walthers stated at the administrative hearing: “When you have people that come in from downtown that threaten you with \$10,000 fines, \$1,000 a day until we jump high enough and do whatever they ask me to do. And that was, that was when I walked away. Then in addition to that when I walked away, I had to sell my home because I was out of money and I was trying to sell my home before the neighborhood would go dead.” He informed the purchasers that there would probably be no lake” He asserted that his plans are to “give everything up that he can” and “get out of town”. See testimony of Walthers.

87 Walthers stated that he would like for the State of Indiana to “meet their responsibility.” See testimony of Walthers.

Conclusions of Law

88 The jurisdiction of DNR⁹: is defined by IC 14-27-7.5-8(a) as follows:

- i) The department:
 - (1) has, on behalf of the state, jurisdiction and supervision over the maintenance and repair of structures in, on, or along the rivers, streams, and lakes of Indiana;
 - (2) shall exercise care to see that the structures are maintained in a good and sufficient state of repair and operating condition to fully perform the intended purpose;
 - (3) shall grant permits for the construction and operation of structures in, on, or along the rivers, streams, and lakes of Indiana;
 - (4) may adopt rules under IC 4-22-2 for permitting, maintenance, and operation that are necessary for the purposes of this chapter; and
 - (5) may vary the standards for permits, maintenance, and operation, giving due consideration to the following:
 - (A) The type and location of the structure.
 - (B) The hazards to which the structure is or may be exposed.
 - (C) The peril to life or property if the structure fails to perform the structure's function.

⁹ The “department” referenced in IC 14-27-7.5-8 is the Department of Natural Resources, referenced as “DNR” in this decision.

IC 14-27-7.5-8(a).

- 89 The authority of DNR, to regulate dams in Indiana, both at the time of the NOV and the administrative hearing, is limited to dams that are not excluded by IC 14-27-7.5-1(B):

This chapter does not apply to the following:

- (1) A structure that meets the following conditions:...

(B) Has a drainage area above the dam of not more than one (1) square mile.

(C) Does not exceed twenty (20) feet in height.

(D) Does not impound a volume of more than one hundred (100) acre-feet of water....

IC 14-27-7.5(B).

- 90 DNR is authorized to "Ascertain, determine, designate and define natural drainage and reclamation areas. ...Prepare computations of the probable maximum quantity of water likely to be collected from a drainage or reclamation area..... IC 14-27-1-1(4) and (5).

- 91 Forest Lake Dam is a structure, as defined by 312 IAC 14-27-7.5-5.

- 92 Forest Lake Dam is on or along a stream.

- 93 Forest Lake Dam has a drainage area above the dam of over one square mile.

- 94 The authority for DNR to regulate dams includes Forest Lake Dam.

- 95 As to the hazard classification, DNR may assign a rating, known as a hazard classification to a dam; "based on the potential consequences resulting from the uncontrolled release of its contents due to a failure or misoperation of the structure." IC 14-27-7.5-2.

- 96 Dam classifications are determined based on "best available information" to be "high hazard", "significant hazard" or "low hazard. IC 14-27-7.5-8¹⁰ and 312 IAC 10.5-3-1.

- 97 When making the determination to classify a dam, DNR "...may consider observations of the dam and the vicinity of the dam, including the risk posed to human life and property if the dam fails." 312 IAC 10.5-3-1(c)(1).

¹⁰ IC 14-27-7.5-8(b) requires the classification of three levels as follows: "...The hazard classification system must include the following classes of structures: (1) High hazard: A structure the failure of which may cause the loss of life and serious damage to homes, industrial and commercial buildings, public utilities, major highways, or railroads. (2) Significant hazard: A structure the failure of which may damage isolated homes and highways, or cause the temporary interruption of public utility services. (3) Low hazard: A structure the failure of which may damage farm buildings, agricultural land, or local roads."

98 A dam owner may request reconsideration of a hazard classification. "(b) The dam owner or other affected person may submit any technical information or reports that were not previously available to the division. (c) The dam owner's or other affected person's professional engineer may develop and submit a maximum breach inundation area and current damage evaluation assessing the downstream area affected by a dam breach. (1) If the maximum breach inundation area and current damage evaluation predicts any of the following, the dam shall be classified as high hazard: (A) Flood depths greater than one (1) foot in any occupied quarters. (B) Loss of human life may occur. (C) Interruption of service for more than one (1) day on any of the following: (i) A county road, state two-lane highway, or U.S. highway serving as the only access to a community. (ii) A multilane divided state or U.S. highway, including an interstate highway. (D) Interruption of service for more than one (1) day on an operating railroad. (E) Damage to any occupied quarters where the flow velocity at the building compromises the integrity of the structure for human occupation. (F) Interruption of service to an interstate or intrastate, utility, power or communication line serving a town, community, or significant military and commercial facility, in which disruption of power and communication would adversely affect the economy, safety, and general well-being of the area for more than one (1) day." 312 IAC 10.5-3-2.

99 Walthers' challenge in this proceeding is considered a request for reconsideration of the hazard classification. However, Walthers presented no technical information or report that was not previously available to the Division of Water to refute the classification. In addition, Walthers failed to present an assessment of the maximum breach inundation area prepared by a dam owner's professional engineer.

100 An uncontrolled breach of the Forest Lake Dam would result in flood depths greater than one (1) foot within, on or about, 12 occupied quarters, as defined by 312 IAC 10.5-2-9, within the maximum breach inundation area, defined by 312 IAC 10.5-2-7. 312 IAC 10.5-3-2(c)(1)(A).

101 The Forest Lake Dam is properly classified as a high hazard dam.

102 The owners of a high hazard dam are required to file inspection reports. The reports are specifically identified in IC 14-27-7.5-9(a), which states:

The owner of a high hazard structure shall:

- (1) have a professional engineer licensed under IC 25-31 make an engineering inspection of the high hazard structure at least one (1) time every two (2) years;
- (2) submit a report of the inspection in a form approved by the department to the department. The report must include at least the following information:
 - (A) An evaluation of the structure's condition, spillway capacity, operational adequacy, and structural integrity.
 - (B) A determination of whether deficiencies exist that could lead to the failure of the structure, and recommendations for maintenance, repairs,

and alterations to the structure to eliminate deficiencies, including a recommended schedule for necessary upgrades to the structure.

IC 14-27-7.5-9(a).

103 A professional engineer is "an individual who, because of special knowledge of the: (1) mathematical and physical sciences; and (2) principles and methods of engineering analysis and design; that are acquired by education and practical experience, is qualified to engage in the practice of engineering, as attested by the individual's registration as a professional engineer and license to practice engineering in Indiana under IC 25-31. *312 IAC 10.5-2-11.*

104 No engineering inspection reports have been submitted by Walthers' professional engineer licensed under IC 25-31.

105 DNR is obliged to issue a notice of violation under IC 14-27-7.5-11 to the owner of a high hazard dam who fails to "have the structure inspected..." or who fails to "perform recommended maintenance, repairs, or alterations to the structure..." or who fails to "biennially submit the inspection report..." *IC 14-27-7.5-9(c).*

106 The NOV issued by DNR, reflects the deficiency by the owners of Forest Lake Dam to have the dam properly inspected and to file required reports.

107 The deficiencies are accurately assessed in that no inspection reports have been submitted to DNR and the evidence supports the issuance of the NOV on that basis.

108 The NOV identifies an additional violation to be that Forest Lake Dam is an unsafe, unauthorized dam.

109 Forest Lake Dam was not initially permitted when it was constructed.

110 Walthers has performed unpermitted and improper alterations to the Forest Lake Dam.

111 The owner of a structure, defined by 14-27.5-5 as a dam¹¹ and its appurtenant works¹², regulated under IC 14-27-7.5, "shall maintain and keep the structure in the state of repair and operating condition required by the following: (1) The exercise of prudence. (2) Due regard for life and property. (3) The application of sound and accepted technical principles." *IC 14-27-7.5-7(a).*

¹¹ "Dam" means an artificial manmade barrier, including appurtenant works, that meets the conditions as given in IC14-27-7.5-1". *312 IAC 10.5-2-3.*

¹² "Appurtenant works" means auxiliary features of a dam that are reasonably required for the safe and proper operation of the structure. The term may include each of the following: (1) The spillway system. (2) Outlet works. (3) Gates and valves. (4) Tunnels. (5) Conduits. (6) Levees. (7) Embankments. *312 IAC 10.5-2-2.*

- 112 For a dam classified as a high hazard dam, following a required inspection, if the “licensed professional engineer who conducted the inspection determines that maintenance, repairs, or alterations to a high hazard structure are necessary to remedy deficiencies in the structure, the owner shall perform the recommended maintenance, repairs, or alterations. If the owner does not “perform the recommended maintenance, repairs or alterations to the structure” DNR is obligated to issue a NOV to the owner of the owner of the high hazard structure. *IC 14-27-7.5-9(b) and (c)*.
- 113 If DNR finds that a structure is “(1) not sufficiently strong; (2) not maintained in a good and sufficient state of repair or operating condition; (3) not designed to remain safe during infrequent loading events; or (4) unsafe and dangerous to life and property; the department may issue a notice of violation under IC 14-25.5-2.” *IC 14-27-7.5-11*.
- 114 DNR inspected the Forest Lake Dam and discovered, as supported by the evidence submitted during the hearing, that Forest Lake Dam is “(1) not sufficiently strong; (2) not maintained in a good and sufficient state of repair or operating condition; (3) not designed to remain safe during infrequent loading events; or (4) unsafe and dangerous to life and property...”, consistent with the requirements set forth in IC 14-27-7.5-11.
- 115 Before the issuance of the NOV, DNR staff observed that the Forest Lake Dam was not found to be in a minimally acceptable state of repair and notified Walthers in writing on February 28, 2013.
- 116 On August 22, 2013, DNR issued the NOV in writing, detailing the violations of IC 14-27-7.5. The violations within the NOV are supported by the evidence presented at the administrative hearing. Forest Lake Dam is incorrectly designed, improperly maintained and in a progressive state of failure.
- 117 As it relates to the regulation of dams in Indiana, an owner “means an individual... who has a right, a title, or an interest in or to the property upon which the structure is located.” *IC 14-27-7.5-4*.
- 118 Walthers is an owner of real property which includes approximately 90% of the structure of Forest Lake Dam, including the lakebed of Forest Lake, the primary and auxiliary spillways as well as a substantial portion of the embankment.
- 119 Due to his ownership interests, the NOV should have been addressed to Walthers. The NOV was addressed to Walthers.
- 120 Walthers’ argues that he should bear less than the full responsibility assessed to high hazard dam owners because DNR approved a downstream subdivision. This issue is not critically considered because the evidence does not support a conclusion that DNR approved the subdivision below the dam.

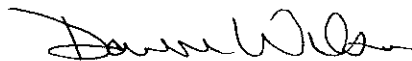
121 Walthers' argues that he should bear less than the full responsibility assessed to dam owners due to the increase in surface water within the watershed of Forest Lake Dam over time. Walthers failed to provide evidence sufficient to support a finding that there has been an increase in surface water to the watershed, or drainage area, of Forest Lake Dam. Even if there is an increase, such an increase would not reduce Walthers' responsibility as an owner of the dam as documented within the NOV.¹³

122 Walthers argues that he should bear less than full responsibility due to parts of the dam being owned by one or more other owners. Walthers and the Richards were identified in the NOV. The Richards settled their dispute with DNR and were dismissed from this proceeding. DNR's authority to issue an NOV extends only to dam owners. Walthers did not identify any owner who was not named in the NOV.

Nonfinal Order

- 1) The NOV is affirmed.
- 2) Walthers shall comply with the requirements identified under the section of the NOV identified as "Action Appropriate to Mitigate the Violation" by completion of either all of Action 1 or all of Action 2, within 90 days.

Dated: March 7, 2016



Dawn Wilson
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, Indiana 46204-2200
(317) 232-4699

A copy of the foregoing was sent to the following:

Paul Walthers
11565 N. Lambert Ct.
Mooresville, IN 46158

¹³ The Commission's jurisdiction in this case is limited to the NOV. This decision does not consider any redress Walthers may have with respect to any other claim. This decision expressly does not advance any position on any matter beyond the scope of this administrative review and the jurisdiction of the Commission.

Sean Wooding
Legal Counsel
Department of Natural Resources
Indiana Government Center South
402 West Washington St., Room W295
Indianapolis, Indiana 46204

A copy of the foregoing was sent as a courtesy to persons listed below. A person filing a pleading or documents is not required to serve these persons:

Dave and Jill Byers
6685 Cross Street
Avon, IN 46123

Jeanne Coonse
6541 Lake Forest Drive
Avon, IN 46123

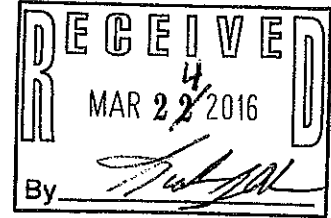
Indira Harden
409 Wild Rose Lane
Avon, IN 46123

Lisa Walthers
5244 11th Street South
Arlington, VA 22204

Jim Andrews, Assistant Engineer
Hendricks Co. Government Center
355 S. Washington Street #209
Danville, IN 46122

DNR Division of Water, Lori Schnaith
DNR Division of Fish and Wildlife, Linnea Petercheff

Paul R. Walthers
11565 N. Lambert Court
Mooresville, IN 46158
317-370-0954



FILED

MAR 22 2016

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

March 22, 2016

AOPA Committee

Natural Resources Commission

Certified Mail with Return Receipt

Indiana Government Center North

100 North Senate Avenue, Room N501

Indianapolis, IN 46204-2200

In the Matter of : Administrative Cause Number: 13-147W (VTS-DM-3951)

Paul R. Walthers, Petitioner vs. Department of Natural Resources,
Respondent

Written Objections:

Identifies the basis of the objections with reasonable particularity. My
objections are not limited to the following information.

AOPA Committee:

The following is the basis of objections to the Findings of Fact and Conclusion of Law with Nonfinal Order.

#24-The Judge held a final status conference which required attendees to attend in person knowing that Paul Walther's daughter would be unable to attend.

The Judge moved forward with the hearing despite knowing full well the exchange of exhibits and witness list had not taken place. And, knowing that the DNR had not provided satisfactory answers to the questions posed by Walthers. (This statement of fact was omitted from Administrative Law Judge (ALJ) which demonstrates the ALJ's bias towards the DNR.)

The ALJ still moved forward with the hearing which is an error and a violation of Walther's rights.

#36 to #38- The ALJ failed to allow calculations from the State of Indiana into evidence which demonstrated the drainage area was less than 1 square mile. (Another example of bias by the ALJ.)

#51- The ALJ failed to understand that approval by the DNR was required in order for the Thornridge development to move forward and therefore was approval for the housing development as no approval permit was necessary for the property to remain as cornfield. (Exhibit D.)

#68-Reference is made to "unauthorized" utility shed. There are three sheds on the dam, one of which is owned by Ronald Richards and was documented in an exhibit picture. The ALJ failed to document that there is a private home on the dam property, owned by Ronald Richards which was stated numerous times by Walthers and included in various exhibit documents by the DNR.

#118 & #119- ALJ states that Walther's owns 90% of the Forest Lake Dam. This is not a statement of fact as the Richards' own a minimum of 40% of the Dam. This fact was stated numerous times during the hearing. The property behind the dam is not an issue for the ALJ as the NOV was the safety of the dam.

#122-the ALJ refused to allow the settlement by the Richard's to be entered as evidence. This is a critical error as the settlement offers no solution to the safety of property or life downstream.

The Richards have the same ability to dewater the lake as Walthers and for the DNR to release one owner demonstrates the dam safety is a ruse. The ALJ should not have issued a final order of dismissal to the Richards.

The NonFinal Order requires Walthers to comply with the requirements identified under the section of the NOV identified as "Action Appropriate to Mitigate the Violation by completion of either all of Action 1 or all of Action 2, within 90 days.

The final order is without merit as it does not include all dam owners and only refers to the NOV solutions which is in conflict with a letter issued from the DNR dated November 25, 2015.

Neither the DNR nor ALJ have demonstrated the dewatering solution is compliant with all local, state or federal agencies and without risk of violation(s). ALJ Stephen Lucas (#9) stated that the DNR would be responsible to confirm that any solution required by the DNR would be in compliance with all local, state, and federal agencies. Without this confirmation the ALJ is unable to order requirements of the dam owners.

For 43 years, I have owned a 6.8 acre pond, south of US 36 by State Road 267 in Hendricks County.

Over the past 43 years, the development of new growth in the Town of Avon, Avon School System, new subdivisions, CXS Railroad, widening of County and State Highways, have increased rain and storm water into my unnamed ditch (farmer's pond) often "illegally" without any active government restrictions or controls of rate of water flow. Now to add to the issue, the Town of Avon is building a \$15 Million Dollar Bridge on State Road 267 and a new mile of road water drainage goes into my pond.

The Department of Natural Resources (DNR) on February 28, 2013, declared my dam is a "high hazard" which is highly disputed. Also, DNR staff declared there

would be a \$10,000 fine and a \$1,000 a day cost until "I hire an engineer and contractor which must do whatever DNR demands". Or, I must prove the dams is safe. Or, I must get rid of the pond and dam which is 75 years old and functioning. The final option requires paying DNR "tens of thousands" extortion money which then would satisfy the issue with DNR.

I am 84 years old fighting bladder cancer and on a limited income. The Judge appointed by the Governor denied me a court Appointed Attorney.

How can DNR and the State of Indiana hold an individual responsible for an increase in surface water drainage of which I have had no control?

My property rights, civil rights, and due process are being aggressively violated by the Indiana Department of Resources.

I do not have tens of thousands of dollars to respond to a three year court case when the DNR keeps changing attorneys (three times) and judges once.

Also the interpretation of the law and the facts are inconsistent with the very poor quality of disclosures made by the DNR.

DNR approved 95 acres of downstream ground northwest of the dam for Thornridge residential subdivision (Exhibits 9 and D).

Now DNR says my dam puts Thornridge at risk when there is less than 35 acre water in the pond (Exhibit 6).

DNR declared seepage in the dam. Over the last six months, I have had many capable people (engineers and contractors) to try to find seepage which they could not.

JURISDICTION:

DNR never produced maps indicating where the water shed begins and what has been added illegally over the years.

State Agencies are required to give full disclosure of maps and models especially to the public when jurisdiction becomes a factor.

Also, more clarity is needed with Indiana Statutes code which regulates small dams. When DNR gives them hazard classification.

If the DNR makes all the interpretations of what is and what is not.. this only lends to abuse and extortion.

There are no streams, creeks or rivers running into Forest Lake Pond. There is a storm water ditch coming out of and off Avon roads, parking lots and streets.

I have a DNR map describing topographic N3945-W8622.517.5 (Exhibit 9)

This map shows less than one square mile of water drainage area. (Exhibit 9 and Exhibit C-13.)

It appears Indiana Law Statutes IN 14-27-7.5-1 does not say **any** one of the following. (Exhibit BB)

It appears DNR and their supervisors gave Dr. Richard's attorney strong advice (orders?) to obtain an engineer and contractor to remove the 75 year old emergency spillway. Which I strongly objected to. This only removed 7 acre water of pressure. This action caused trespassing and thousands of dollars worth of damage to the emergency spillway. Also, this has changed the water way out of the pond which now makes the road and bridge at high risk during heavy rains. (Exhibit 10).

Paul Walthers shares ownership with Donald D. and Carolyn A. Richards of Lake Forest Dam. (Exhibit A 1).

How can pursuant to Indiana Code 14-25.5, Actions 1 and 2 cited in Exhibit A 1 be performed without notice of violation being changed or dismissed?

Please help me resolve this.

Thank you.

Paul R. Walthers

P.S.

exh A1



Indiana Department of Natural Resources

Michael R. Pence, Governor
Cameron F. Clark, Director

December 8, 2015

Paul R. Walthers
11565 N. Lambert Ct.
Mooresville, IN 46158

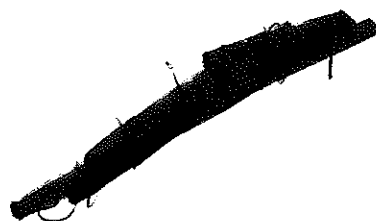
Re: Administrative Cause #13-147W, VTS-DM-3951

Mr. Walthers:

Attached you will find the settlement agreement entered into between the Richards and DNR.

Regards,

Sean R. Wooding
Office of Legal Counsel
Department of Natural Resources
402 W. Washington St., Rm W295
Indianapolis, IN 46204
317.234.9592
swooding@dnr.in.gov



ex A1

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

PAUL WALTHERS, RONALD RICHARDS)	
and CAROLYN RICHARDS,)	Administrative Cause
Petitioners,)	Number: 13-147W
)	
vs.)	
)	
DEPARTMENT OF NATURAL RESOURCES,)	(VTS-DM-3951)
Respondent.)	

FINAL ORDER OF DISMISSAL AS TO RONALD AND CAROLYN RICHARDS

On November 17, 2015, Petitioners, Ronald and Carolyn Richards ("Richards"), and Respondent, Department of Natural Resources ("DNR"), filed an "Agreed Settlement and Stipulation of Dismissal". Through the Agreed Settlement and Stipulation of Dismissal, Richards and DNR agree and stipulate to the dismissal of Richards from this administrative action.

Being duly advised, the motion is GRANTED. Pursuant to 312 IAC 3-1-9(a), a final order of dismissal is entered.

A person who wishes to seek judicial review must file a petition for review in an appropriate court within 30 days and must otherwise comply with IC 4-21.5-5. Service of a petition for judicial review is also governed by 312 IAC 3-1-18.

Dated: November 18, 2015.



Dawn Wilson
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, Indiana 46204-2739
(317) 234-9516

A copy of the foregoing was sent to the following:

Paul Walthers
6591 Lake Forest Drive
Avon, IN 46123

Paul Walthers
11565 N. Lambert Ct.
Mooresville, IN 46158

PETITIONERS: Paul althers/Ronald and Carolyn Richards
CASE NUMBER: 13-147W

ex A1

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A copy of the foregoing was sent as a courtesy to persons listed below. A person filing a pleading or documents is not required to serve these persons:

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Avon, IN 46123

Jeanne Coonse
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Avon, IN 46123

Indira Harden
409 Wild Rose Lane
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Lisa Walthers
5244 11th Street South
Arlington, VA 22204

Jim Andrews, Assistant Engineer
Hendricks Co. Government Center
355 S. Washington Street #209
Danville, IN 46122

DNR Division of Water, Lori Schnaith
DNR Division of Fish and Wildlife, Linnea Petercheff

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is entered into this 4th day of November, 2015, between Ronald & Carolyn Richards (collectively "Richards") and Indiana Department of Natural Resources ("DNR"). The Richards and DNR are collectively referred to herein as the "Parties."

RECITALS

A. The Richards own property located at 6605 Lake Forest Drive in Avon Indiana ("Property").

B. On or about August 22, 2013, DNR issued a Notice of Violation to Paul Walthers ("Walthers") and the Richards under VTS-DM-3951 ("NOV"). DNR claims jurisdiction over the alleged dam impounding Forest Lake ("Forest Lake Dam").

C. In the NOV, DNR alleges that Walthers and Richards, as owners of the Forest Lake Dam, have violated the Dam Safety Act, Ind. Code 14-27-7.5. DNR demands that Forest Lake Dam either be reconstructed or decommissioned under supervision and approval of the DNR.

D. Richards and Walthers sought an administrative review of the NOV before the Natural Resource Commission, and such is now pending under Administrative Cause Number 13-147W ("Administrative Action.").

E. Richards do not own Forest Lake, the primary spillway, or the auxiliary/emergency spillway of Forest Lake Dam; rather, Richards own property immediately adjacent to Forest Lake that extends south toward the primary spillway. It is believed by the Parties that Walthers owns Forest Lake, the primary spillway, and the auxiliary/emergency spillway, as well as additional land surrounding Forest Lake Dam.

F. As the result of the condition of Forest Lake Dam's primary spillway in July 2015, and under the demand of DNR for emergency measures to relieve pressure from the primary spillway, Richards incurred significant costs to lower the level of Forest Lake; specifically, Richards employed Holloway Engineering and HIS Constructors to plan and implement the construction of a channel from the emergency spillway.

G. DNR alleges that additional work is required on Forest Lake Dam in order to bring it into compliance, or Forest Lake Dam should be decommissioned.

H. The Parties desire to resolve and settle their disagreement concerning Forest Lake, Forest Lake Dam, the NOV, and the Administrative Action, and to avoid additional litigation over these matters ("Disputed Claims").

I. The Parties believe that the settlement reflected by this Agreement is fair, reasonable and equitable and in their respective best interests.

CXA

AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants contained in this Agreement, the actions taken pursuant thereto, and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:


1. Recitals. The Recitals set forth above are incorporated herein by reference.
2. Settlement, Access, Release, Dismissal.

2.1 **Payment Terms.** Subject to all terms and conditions contained in this Agreement, Richards agree that on or before thirty days after the execution of this Agreement, Richards shall deliver to DNR's counsel a check payable to the "Indiana Department of Natural Resources" (tax ID number 35-6000158) in the amount of Three Thousand Dollars (\$3,000.00) in full and final settlement of the Disputed Claims. DNR shall place these funds into the Division of Water Environmental Fund for use on Forest Lake Dam.

2.2 **Property Access.** Richards and their heirs or assigns agree to allow access to DNR and/or Walthers (or their agents) to the Property for the sake of completing work on Forest Lake Dam that is mutually agreeable to Richards and DNR. The scope of work may potentially include decommissioning and/or dewatering activities, including the excavation and placement of soil on the Property. It is agreed that any work on the Property is completed at no expense to Richards, and it will not unreasonably interfere with their use and enjoyment of the Property, including but not limited to, the destruction of the wooded area, except for the necessary loss of a couple trees and the filling of the voids left by the root balls associated with the cutting of those select trees. The placement of soil from a potential decommissioning of the dam will be placed into two areas, with the area on the Property to receive up to 500 cubic yards of soil not to exceed a 4 foot depth, and all such soil not to extend beyond the boundaries indicated on the Holloway Engineering figure attached hereto as Exhibit A. Richards may require any party and/or contractor completing work on the Property to agree to release, indemnify, and hold harmless Richards, as well as agree to not record any lien on the Property and to immediately release any lien recorded on the Property as a result of work on the Property.

2.3 **Mutual Release.** Except for any breaches by DNR of its obligations under this Agreement, Richards hereby release and forever discharge DNR from and against any and all liabilities, claims, actions, or suits, known or unknown, that Richards have or could assert against DNR relating to or arising from the Disputed Claims. Similarly, except for any breaches by Richards of their obligations under this Agreement, DNR hereby releases and forever discharges Richards from and against any and all liabilities, claims, actions, or suits, known or unknown, that DNR has or could assert against Richards relating to or arising from the Disputed Claims.

2.4 **Dismissal.** In recognition of the settlement reached, Richards and DNR stipulate to the dismissal of the Administrative Action, with prejudice, and within 5 days



this Agreement being fully signed, DNR and Richards will request that the Court enter an order dismissing the Richards from the Administrative Action. A copy of the "Stipulation of Dismissal" to be filed with the Court is attached hereto as Exhibit B. This Agreement shall survive the dismissal or other resolution of this action.

2.5 **Non-Admission.** Nothing in this Agreement can or should be construed as an admission of liability of any Party hereto as to any matter covered by this Agreement.

2.6 **Non-Admissibility.** Neither this Agreement nor any matters relating to the terms or negotiations of this Agreement shall be admissible in any lawsuit or other proceeding for any purpose other than to establish a term or condition of this Agreement that a Party purportedly has breached, or to enjoin or dismiss a lawsuit or other proceeding brought in violation of this Agreement.

2.7 **Integration Clause.** This Agreement is an integrated agreement and contains the entire agreement regarding the matters herein between the Parties. No representations, warranties, or promises have been made or relied on by a Party hereto other than as set forth herein. This Agreement supersedes and controls any and all prior communications between the Parties or their representatives relative to the matters contained herein.

2.8 **Severability.** If any part, term, or provision of this Agreement shall be deemed to be prohibited, invalid, or unenforceable by any applicable law, such provision shall be replaced by a provision that comes as close as possible to the intended result of the invalid provision, and the economic purpose thereof, and which is valid and enforceable. The invalidity of any part, term, or provision of this Agreement shall not invalidate or affect the remaining parts, terms, or provisions hereof and all such remaining parts, terms, and provisions shall remain in full force and effect.

2.9 **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original.

2.10 **Authority to Sign.** The undersigned state that each is duly authorized to execute this Agreement on behalf of the Party for which each is signing and that each fully understands the terms as set forth above.

IN WITNESS WHEREOF, the Parties have executed this Agreement by their duly authorized representatives as of the day first written above.

[SIGNATURES FOLLOWING - THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

Indiana Department of Natural Resources

Taefforge (for) Dated: 11/17/15

By: Chris Smith

Its: Deputy Director

SW
Sean Wooding, counsel to DNR

Ronald Richards

Ronald Richards Dated: 11/5/15

Carolyn Richards

Carolyn Richards Dated: 11/5/2015

Nicholas Gahl 11-9-15
Nicholas Gahl, counsel to Richards

EX A1

Hendricks County, IN

Report

Map tip hover mode

Richards
↓
dam

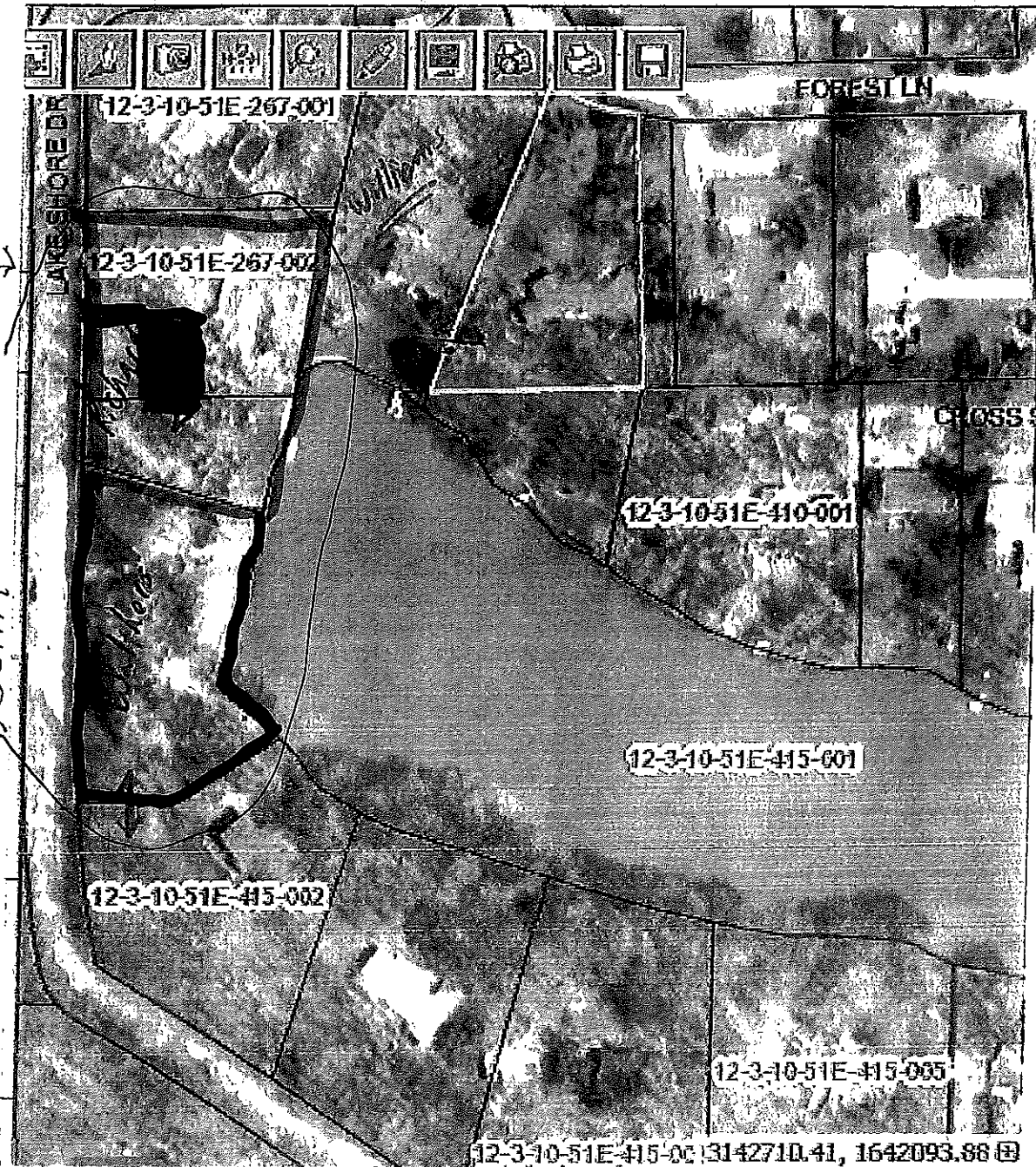


exhibit A 4

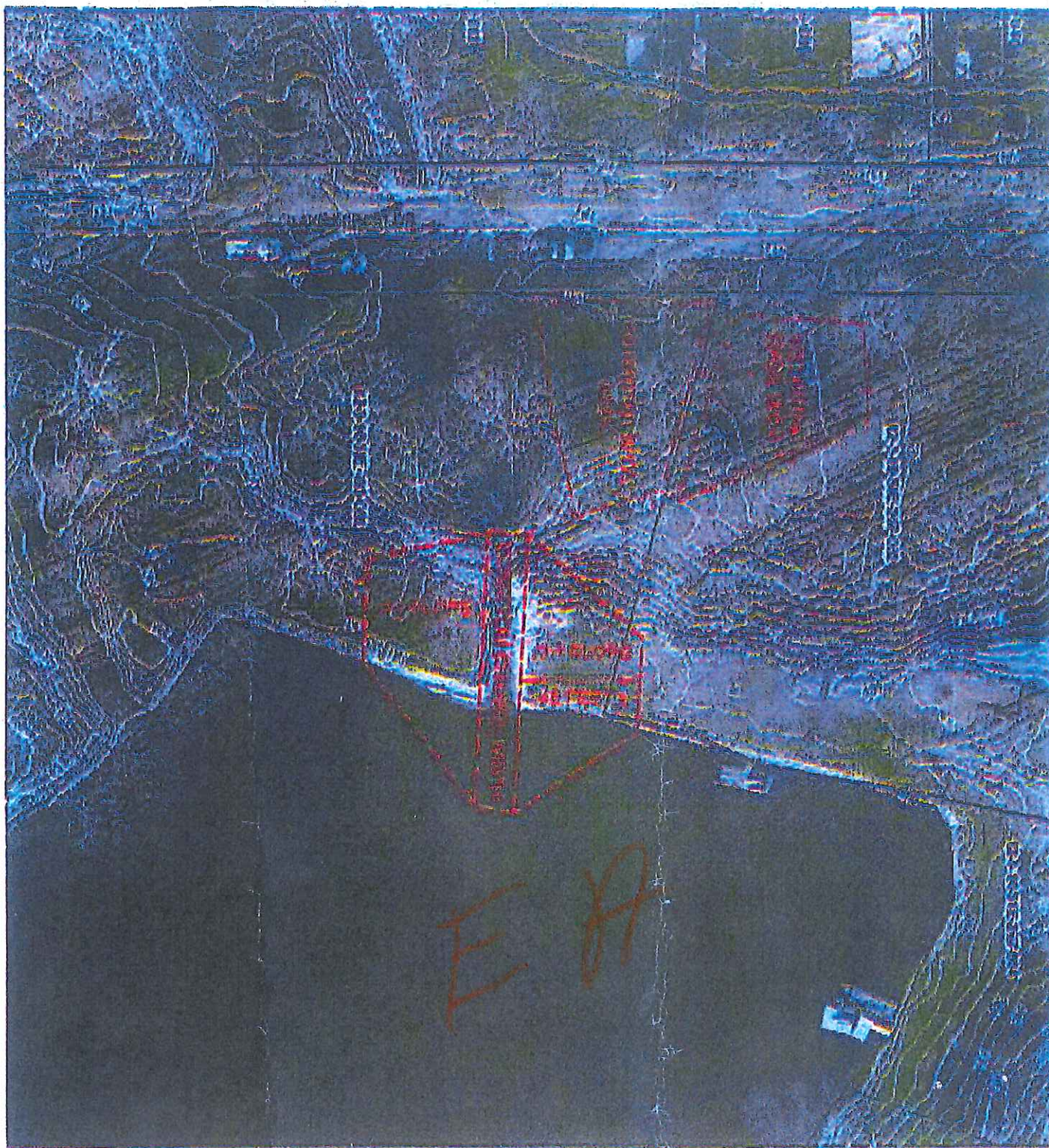


Exhibit ~~13~~ 131

ex A1



Indiana Department of Natural Resources

Michael R. Pence, Governor
Cameron F. Clark, Director
Division of Water
402 W. Washington Street
Room W264
Indianapolis, IN 46204
Phone (317) 232-4160
Toll-free (877) 928-3755
Fax (317) 233-4579

NOTICE OF VIOLATION
VTS-DM-3951

MAILED AUG 22 2013

Paul R. Walthers
6591 Lake Forest Drive
Avon, Indiana 46123

Certified Mail # 7002 2030 0006 6584 2016

Ronald D & Carolyn A. Richards
6605 Lake Forest Drive
Avon, Indiana 46123

Certified Mail # 7002 2030 0006 6584 2030

The Division of Water hereby issues this Notice of Violation pursuant to Indiana Code 14-25.5 as follows:

NATURE OF THE VIOLATION

Forest Lake Dam is a high hazard dam (State Identification #32-17), and is located in Section 10, Township 15N, Range 1E, showing on the Brownsburg Quadrangle map, and within Hendricks County.

A dam owner is required by Indiana Code (I.C.) 14-27-7.5 to keep the structure (dam) maintained and in a safe condition by the exercise of prudence, due regard for life and property, and the application of sound and accepted technical principles.

Findings:

The owners of the Forest Lake Dam are Paul R. Walthers, and Ronald D & Carolyn A. Richards.

The Forest Lake Dam is an unsafe, unauthorized dam. There is no record of a permit issued for this dam or as-built engineering plans proving the structure was properly designed and constructed. A high hazard inspection report has not been received for the structure as required by I.C.14-27-7.5.

The owners of the Forest Lake Dam have failed to maintain and keep the structure in the state of repair and operating condition required by the exercise of prudence, due regard for life and property, and the application of sound and accepted engineering principles which is a violation of Indiana Code 14-27-7.5.

The owners have not complied with the recommendations of the February 23, 2013 letter which asked that the owners to complete a series of scheduled actions including retaining registered professional engineer experienced in dam design, performing high hazard inspection reports and submitting such reports to DNR. Also requested was a lowering of the lake to safer level until safety deficiencies could be resolved. These actions and the failures to act are violations of Indiana Code 14-27-7.5.

ACTION APPROPRIATE TO MITIGATE THE VIOLATION

The Department of Natural Resources has determined either all of Action 1 or all of Action 2 described below, is appropriate to mitigate this violation:



Action 1:

- 1) Paul R. Walthers, and Ronald D & Carolyn A. Richards shall hire a registered professional engineer experienced in dam design, construction, repair, and maintenance.
- 2) Paul R. Walthers, and Ronald D & Carolyn A. Richards and/or the registered professional engineer shall immediately activate the dam's Incident and Emergency Action Plan (IEAP).
- 3) Paul R. Walthers, and Ronald D & Carolyn A. Richards and/or their authorized representatives, within ten days (10 days) of receipt of this notice, shall have the registered professional engineer submit a letter to the Division of Water stating that he/she has been contracted to develop a plan to reconstruct the dam and spillway to safe conditions. Enclosed is a list of engineering firms with dam experience.
- 4) Paul R. Walthers, and Ronald D & Carolyn A. Richards and/or their authorized representatives, shall under the direction of a registered professional engineer, immediately and safely dewater or lower the lake level to a safer level determined by the engineer and agreed to by DNR.
- 5) Paul R. Walthers, and Ronald D & Carolyn A. Richards and/or their authorized representatives, shall obtain a permit from the Department of Natural Resources to reconstruct the dam and spillway to a safe condition and shall submit as-built plans at the completion of the project.
- 6) Paul R. Walthers, and Ronald D & Carolyn A. Richards and/or their authorized representatives, shall maintain the lowered water level until the reconstruction plan has been approved, completed under the direction of a registered professional engineer and as built plans submitted to the Department.

Or

Action 2:

- 1) Paul R. Walthers, and Ronald D & Carolyn A. Richards shall hire a registered professional engineer experienced in dam design, construction, repair, and maintenance.
- 2) Paul R. Walthers, and Ronald D & Carolyn A. Richards and/or the registered professional engineer shall activate your dam's Incident and Emergency Action Plan (IEAP).
- 3) Paul R. Walthers, and Ronald D & Carolyn A. Richards and/or their authorized representatives, shall under the direction of a registered professional engineer, immediately and safely dewater or lower the lake level to a safer level determined by the registered professional engineer and agreed to by DNR.
- 4) Paul R. Walthers, and Ronald D & Carolyn A. Richards and/or their authorized representatives, within ten days (10 days) of receipt of this notice, shall have the registered professional engineer submit a letter to the Division of Water stating that he/she has been contracted to develop a plan to safely permanently dewater and control breach (decommission) the dam.

INDIANA DEPARTMENT OF TRANSPORTATION
INDIANAPOLIS, INDIANA 46204-2249
INTER-DEPARTMENT COMMUNICATION

November 2, 2001

TO: Mr. Brad Steckler
Supervisor, Pre-Engineering Studies

FROM: Mr. Bill Schmidt *WBS*
Hydraulics Engineer

SUBJECT: Preliminary Hydraulic Review
Structure: S.R. 267 over tributary to White Lick Creek
Des. No.: 0012640
Contract No.: STP-129-4()
Location: 0.4 miles south of U.S. 36 (railroad bridge)
Consultant: USI

Discussion of Structure Sizing for preliminary hydraulics

The project discussed above involves the S.R. 267 structure over tributary to White Lick Creek as part of the railroad bridge. The current structure is a 6.92 ft. high by 10.67 ft. span corrugated metal arch pipe. The existing structure is not hydraulically adequate. The recommended replacement structure is a 5 ft. high by 12 ft. span three or four-sided concrete box culvert with wingwalls (or projecting). A 6 ft. high by 12 ft. span concrete arch may be used as well.

Approximate Drainage Area	= 0.86 sq.mi.
Approximate Q100 Discharge	= 465 cfs
Approximate Q100 Depth	= 4.86 ft.
Maximum Allowable Backwater Q100	= 1.0 ft.
Required Minimum Wet Area Below Q100	= see sizing above
Approximate Grade Raise	= 0.0 ft.
Minimum Freeboard	= 0.0 ft.
Outlet Velocity	= 12.01 ft/s.

If you have any questions or comments, please contact me at
(317) 232-5332.

WPS

cc: Hydraulic file (1)

Exhibit - 10

Paul Walthers
11565 N Lambert Ct
Mooreville, IN 46158-6565

October 20, 2015

Hendricks County Board of Commissioners
355 South Washington Street
Danville, IN 46122
commissioners@co.hendricks.in.us

G.E. Steuerwald
Attorney at Law for Hendricks County

gsteuerwald@shzwlaw.com

RE: Dam and Forest Lake in Avon, IN

Dear Sirs,

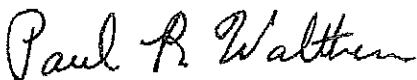
I, Paul Walthers, satisfied the exit of volume of water movement (cfs) for 33 years out of my 6.8 acre pond without any damage to people or property.

In July 2015, Kenneth Smith of DNR ordered the removal of the 74+ year old emergency spillway of which I strongly objected. The destroyed emergency spillway has changed the water way out of my pond.

Please, you are on notice not to hold me responsible in any way for any road or bridge damage in the future.

Please call me anytime -- 317.370.0954

Thank you,



Paul R. Walthers
pwalthers@att.net

cc: Lisa Walthers
Ldwalthers@yahoo.com



Indiana Department of Natural Resources

www.in.gov/dnr/

Exhibit BB

Michael R. Pence, Governor
Robert E. Carter, Jr., Director
Division of Water
402 W. Washington Street
Room W264
Indianapolis, IN 46204
Phone: (317) 232-4160
Toll-free: (877) 928-3755
Fax: (317) 233-4579

Paul R. Walthers
6591 Lake Forest Dr
Avon, IN, 46123

February 28, 2013

Richards Ronald D & Carolyn A
6605 Lake Forest Dr
Avon, IN 46123

Re: Forest Lake Dam, Hendricks Co., 32-17
CERTIFIED MAIL 7007 2680 0000 6708 7439

Dear Dam Owners:

This letter is in regard to an unauthorized, unsafe dam located on your property in Section 10, T.15 N., R. 1 E. in Hendricks County. Indiana Code 14-27-7.5 establishes Indiana Department of Natural Resources (IDNR) authority over a dam that meets **any** one of the following conditions:

- The drainage area above the dam is more than one (1) square mile; or
- The dam impounds more than one hundred (100) acre-feet of water to the top of dam or to the maximum pool level, whichever is lower, or
- The dam exceeds twenty (20) feet in height from the lowest point in natural streambed under the centerline of the dam to the top of dam, or
- If someone downstream of the dam petitions IDNR, in writing, to investigate the hazard classification and IDNR finds that a potential failure of the dam may cause loss of life/injury and/or serious damage to a downstream structure (such as a house), then the dam will be considered high hazard and will be under IDNR's jurisdiction (regardless of the dam size).

The Forest Lake Dam is located in a drainage area more than 1 square mile and therefore, the structure is within IDNR's jurisdiction. There are significant safety and compliance issues with this structure. The most obvious are listed below:

- 1) The dam is classified as high hazard since an uncontrolled breach of the structure could cause serious damage to the downstream Thornridge Subdivision and possible loss of life.
- 2) The existing spillway system is inadequate to safely pass the design storm for this high hazard structure.
- 3) The upstream and downstream slopes of the embankment are steep and appear marginally stable. A slope failure would reduce the crest width leading to a possible breach.
- 4) The maintenance of the structure is deficient. The trees and the root system have compromised the integrity of the dam.
- 5) There are no records in IDNR's files that indicate that a permit was issued on this dam or "as built" engineering plans proving the structure was properly designed and constructed.
- 6) A high hazard inspection report, prepared by your engineer and required by I.C. 14-27-7.5, has not been received by the Division of Water. The owner of a high hazard structure (dam) is required to have a professional engineer licensed under IC 25-31 make an engineering inspection of the high hazard structure at least one (1) time every two (2) years; and to submit the report to the Division of Water.

Section 5 of I.C. 14-27-7.5 requires a dam owner to maintain and keep a dam in the state of repair and operating condition required by the exercise of prudence, due regard for life and property and the application of sound and accepted engineering principles.

Exhibit D

APPLICATION: FW-16,625

STATE OF INDIANA
DEPARTMENT OF NATURAL RESOURCES

CERTIFICATE OF APPROVAL OF CONSTRUCTION IN A FLOODWAY

APPLICANT:

ThornRidge, Inc.
P.O. Box 188
Plainfield, IN 46168

AGENT:

Parsons, Cunningham & Shurtle
Engineers, Inc.
46 South Tennessee Street
Danville, IN 46122

STREAM:

UNT White Lick Creek

AUTHORITY:

IC 13-2-22, 310 IAC 6-1

PROJECT DESCRIPTION:

The proposed ThornRidge residential subdivision will be developed landward of the floodway excepts portions of Lots 13, 14, and 15. Construction activities within the floodway will consist of: two 18" diameter storm sewer outfall pipes with metal end sections, and approximately 30 linear feet of a grass swale with 4:1 side slopes. Riprap laid on geotextiles will be placed at the base of the outlets for energy dissipation. Details of the project are shown on plans received at the Division of Water on January 30, 1995, and February 13, 1995.

PROJECT LOCATION:

Approximately 200' downstream of the Forest Lake outlet,
at Avon, Washington Township, Hendricks County
NE $\frac{1}{4}$, NE $\frac{1}{4}$, SW $\frac{1}{4}$, Section 10, T. 15 N., R. 1 E., Brownsburg Quad-angle
UTM Coordinates: Downstream = 4400480 North, 550600 East

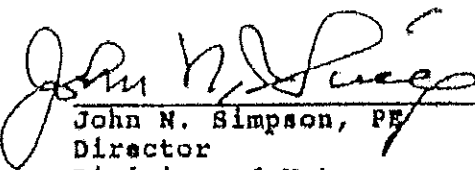
AUTHORIZATION AND APPEAL NOTICE:

This signed document constitutes the issuance of a permit by the Natural Resources Commission, or its designee, subject to the conditions as stated on the pages entitled "General Conditions" and "Specific Conditions". This permit or any of the conditions which it contains may be appealed by applying for administrative review. Such review is governed by the Administrative Orders and Procedures Act, IC 4-21.5, and by the Department's rules relating to adjudicative proceedings, 310 IAC 0.6. In order to obtain an appeal, a written petition must be filed within 18 days of the mailing of this notice. It should be addressed to:

Mr. Stephen L. Lucas, Director
Division of Hearings
Room W272
402 West Washington Street
Indianapolis, Indiana 46204

The petition should contain specific reasons for the appeal and indicate the portion(s) of the permit to which the appeal pertains. If an appeal is filed, the Natural Resources Commission will make the final agency determination following a legal proceeding conducted before an Administrative Law Judge.

April 7, 1995
Date


John N. Simpson, PE
Director
Division of Water

Documents prepared by: Jessica Sasseville

STATE OF INDIANA
DEPARTMENT OF NATURAL RESOURCES

SPECIFIC CONDITIONS

- (1) other than those measures necessary to satisfy the "General" and "Specific" conditions, there shall be no deviation from the information received at the Division of Water on the following date(s) without the prior written approval of the Department of Natural Resources:

Information received: January 30, 1995, and February 13, 1995

- (2) this approval shall become void if construction has not been initiated within 24 months from April 7, 1995
- (3) maintain functional erosion and sediment control measures until all disturbed areas are stabilized
- (4) protect storm water inlets from sediment entry where storm sewers outlet directly into channel or floodway
- (5) control erosion and sediment on land adjacent to the floodway to prevent resulting sedimentation of the channel or floodway
- (6) seed and protect all disturbed streambanks with erosion control blankets when they are not protected by other structural methods
- (7) minimize and contain within the project limits all tree and brush clearing and provide the opportunity to utilize cleared trees of firewood and timber size
- (8) if this project is located in an urban setting and involves the removal of more than five trees, incorporate tree planting into the site revegetation and/or mitigation plan
- (9) revegetate all bare and disturbed areas with a mixture of grasses (excluding all varieties of tall fescue) and legumes upon completion
- (10) place all excavated material landward of the floodway
- (11) do not leave felled trees, brush, or other debris in the floodway
- (12) do not construct or place any residences or abodes (including manufactured homes as defined under 44 CFR 59.1) in the floodway as shown on the enclosed floodway map delineated by the Department dated April 7, 1995
- (13) any other construction, including excavation and fill, proposed in the floodway will require the prior written approval of the Department of Natural Resources

Memo to File: FW-16,625

April 7, 1995

Page Two

This project in conjunction with any other previously approved or currently proposed projects located in the floodway near this site will not cause an adverse effect on the efficiency or the capacity of the floodway, nor will it pose an unreasonable hazard to life or property.

Recommendations: The Division of Water recommends this application be approved with the following condition(s):

- ① place all excavated material landward of the floodway (FW01)
- ② do not leave felled trees, brush, or other debris in the floodway (FW03)
- ③ do not construct or place any residences or abodes (including manufactured homes as defined under 44 CFR 59.1) in the floodway as shown on the enclosed floodway map delineated by the Department dated April 7, 1995
- ④ any other construction, including excavation and fill, proposed in the floodway will require the prior written approval of the Department of Natural Resources

ck 05/4-7-95

State of Indiana
DEPARTMENT OF NATURAL RESOURCES
Division of Water

DIVISION OF WATER MEMORANDUM

Date: April 7, 1995

To: Files

From: Jessica Sasseville

Application No. FW-16,625

Hydraulic Engineer

Drainage Area: Approximately 1.1 square miles.

Hydrology: Based on the discharge request form completed by the Hydrology and Hydraulics Section, the 100-year frequency flood discharge of 800 cfs can be expected to pass the proposed site.

Water: The purpose of the proposed project is to construct the ThornRidge residential subdivision along the right (north) streambank of an unnamed tributary to White Lick Creek. Construction activities within the floodway will include: dual 18" diameter storm sewer outfall pipes with metal end sections, and approximately 30 linear feet of a grass swale with 4:1 side slopes. Riprap will be placed at the base of both outlets for energy dissipation.

Based on the plans received at the Division of Water on January 30, 1995, and February 13, 1995, the proposed project will not decrease the cross-sectional flow area of the stream. The end sections and riprap placed for the storm sewer outfalls will conform to the existing bank. The swale will not have embankments placed on either side.

The staff used the cross-sections provided on February 13, 1995, to develop a HEC-2 hydraulic model for the stream. This was done to determine the 100-year elevation and the floodway limits. A model was completed for the length of the stream from the mouth at White Lick Creek to just downstream of the proposed project for Recommendation #32-941209-1 by Dena Barnhouse. This model was compiled from 2' mapping.

The contours and cross-sections submitted for the proposed subdivision did not match closely to the 2' mapping. Also, the Recommendations Section model used the slope conveyance method with a much steeper slope than is present for this site. For these reasons, only three cross-sections at the upstream end of the model were utilized for this analysis. The three submitted cross-sections for the site were added to the three cross-sections downstream. The starting water surface elevation was used at the downstream cross-section. The 100-year elevation ranges from 783.4', N.G.V.D., at the downstream end of the site to 783.7', N.G.V.D., at the upstream end of the site. The floodway and flood fringe were plotted on the submitted site plan and will be enclosed with the permit. Peggy Shepherd, Section Head of Hydraulics and Hydrology, has been involved in the floodway determination and gave the final approval.



DISCHARGE REQUEST FORM

Ser. #: 8099

Location Information

Requested by: JESSICA SASSEVILLE Date: 2/6/95 Section: STREAM PERMITSTREAM NAME: UNT WILDE LICK CREEK Frequency: 100-YRLocation description: APPROX 200' D/S OF FOREST LAKE @ ROAD CULVERTQuad name: BROWNSBURG UTMN: 4 400400 UTME: 550600BASIN #: 1B County: HENDRICKS Section: 10 Township: 15N Range: 1E

Location Related Parameters

Stream remarks: _____

Precipitation index: 11.3

USGS area (if used): _____

Relief: $(861 - 780) = 81$

Intervening area: + - _____

Drainage density: _____ Code: _____

Total Drainage area: = 1.13Runoff coefficient: .7

Non-contributing area: - _____

Slope: $(\frac{853 - 796}{.76 \times 2.92}) = 25.50$ Eff. drainage area: = 1.13Curve number: 12-27-94 80
requestLength: $(34 - .42) = 2.98$ Time of concentration: 2.81

Frequency Related Parameters

Request date: 2-6-95 Frequency: 100



Freq.	Line #	Method Code	Alpha Code	Data 1	Data 2	Data 3	Data 4	Data 5
<u>100</u>	<u>1</u>	<u>UG</u>	<u>100</u>	<u>3.72</u>	<u>3</u>	<u>.2</u>	<u>80</u>	<u>2.81</u>
<u>100</u>	<u>2</u>	<u>UG</u>	<u>100</u>	<u>5.91</u>	<u>24</u>	<u>.2</u>	<u>80</u>	<u>2.81</u>
<u>100</u>	<u>3</u>	<u>BE</u>	<u>B</u>	_____	_____	_____	_____	_____
<u>100</u>	<u>4</u>	<u>GL</u>	<u>100</u>	<u>2.98</u>	_____	_____	_____	_____
<u>100</u>	<u>5</u>	<u>HU</u>	<u>100</u>	<u>3.72</u>	<u>3</u>	<u>.2</u>	<u>80</u>	<u>2.81</u>
<u>100</u>	<u>6</u>	<u>HU</u>	<u>100</u>	<u>5.91</u>	<u>24</u>	<u>.2</u>	<u>80</u>	<u>2.81</u>
_____	_____	_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____	_____	_____



Comments: _____



 $C_{100} = 800 cfs$
(Method code:)



ERVAL 10 FEET
AN SEA LEVEL



QUADRANGLE LOCATION

Primary highway,  Light-duty road, hard or improved surface 

hard surface  Unimproved road 

Secondary highway,  U. S. Route 

hard surface  State Route 

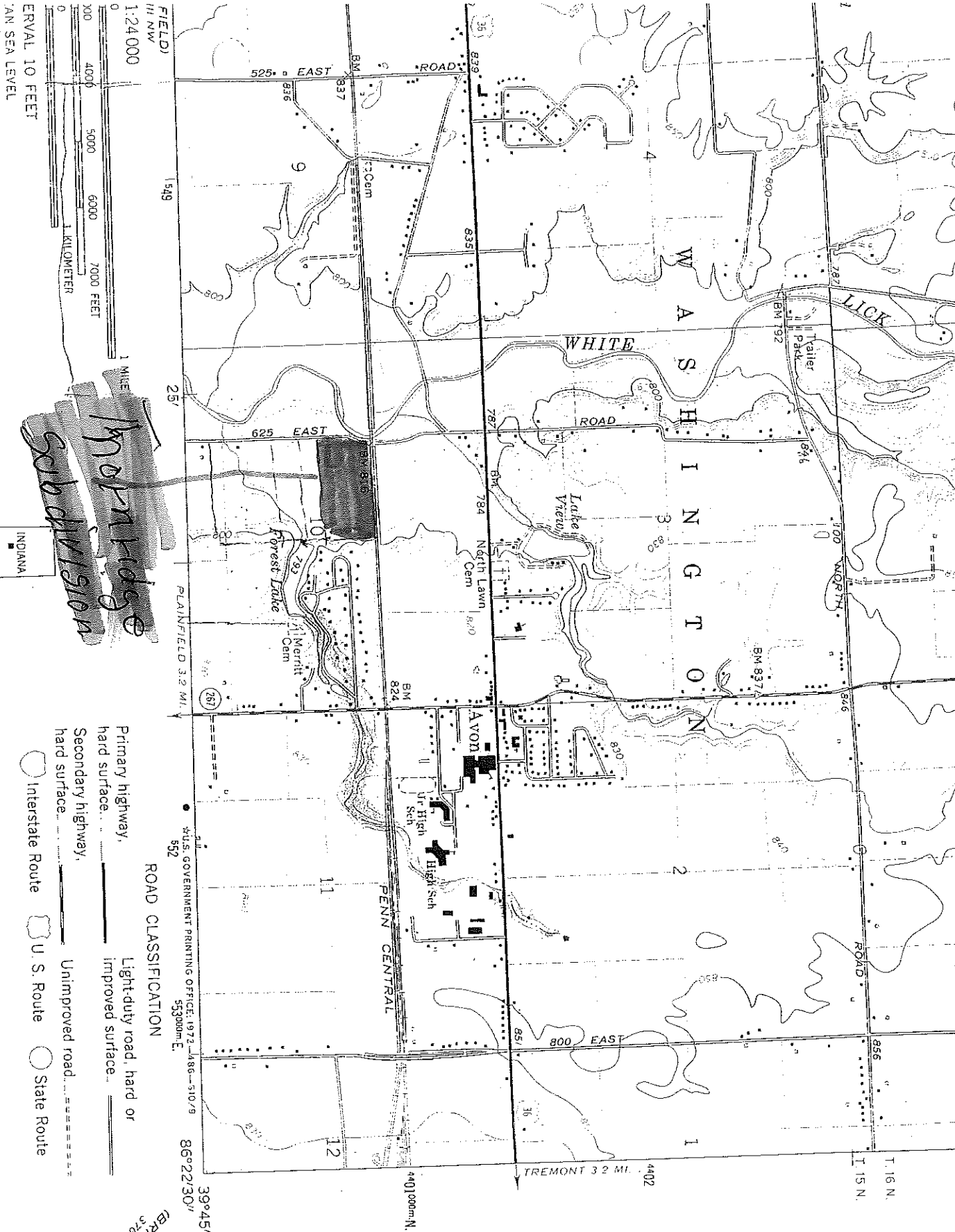
 Interstate Route 

ROAD CLASSIFICATION

(BRIDGEPORT
3763 III NE

BROWNSBURG, IND
N3945--W8622.5/7.5
1970
AMS 3763 IV SW--SERIES V851

CLAIMANT'S
EXHIBIT
7



BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

FILED

APR 01 2016

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

IN THE MATTER OF:

PAUL WALTHERS,
Claimant,

vs.

DEPARTMENT OF NATURAL RESOURCES,
Respondent.

) Administrative Cause
) Number: 15-031W
)
)
)
)

(VTS-DM-3951)

**RESPONDENT DNR'S MOTION TO STRIKE PETITIONER'S UNTIMELY FILED
WRITTEN OBJECTIONS**

The Department of Natural Resources (Department), by counsel, moves the Commission to strike Petitioner's Written Objections to the Nonfinal Order, and in support, states as follows:

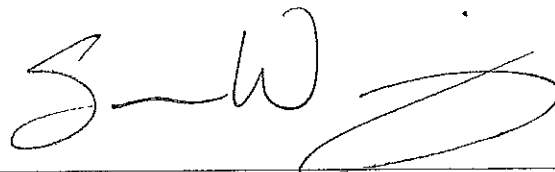
1. On March 7, 2016, the Commission issued a Notice of Filing Findings of Fact and Conclusions of Law with Nonfinal Order. The Commission stated that in order to preserve an objection to the document, a written objection must be filed to the AOPA Committee by March 28, 2016.
2. On March 28, 2016, the Department received an entry from the Commission that the Petitioner had sent "Written Objections" to the Commission, but not served those Objections upon the Department in accordance with Indiana Code § 4-21.5-3-17(c).
3. The Commission stated that parties were advised of the filing requirement to all parties in the following instances: *Notice of Initial Prehearing Conference, Report of Initial Prehearing Conference, Notice of Second Prehearing Conference, Disclosure of Ex Parte Communication, Order Denying Court Appointed*

Attorney, and Order to Disclose Ownership.

4. Petitioner has repeatedly violated Indiana Code § 4-21.5-3-17(c).
5. The Department received the Petitioner's Written Objections by email from Lisa Walthers, a non-party, on March 30, 2016.
6. The Commission stated in the March 28, 2016 Entry that, "Upon receipt of verification that the document was served upon all parties contemporaneously with its submission to the Commission, the Commission will cause the document to be duly filed in the record of the proceeding and will, at that time, act upon the request."
7. The Petitioner's Written Objections were not served upon all parties until March 30, 2016, and not timely filed as set by the Commission in March 7, 2016 Notice of Filing Findings Fact and Conclusion of Law with Nonfinal Order.

WHEREFORE, the Department moves the Commission to strike Petitioner's objections as untimely filed, tender the Nonfinal Order to the Secretary for final action, and for all other appropriate relief.

Respectfully submitted:

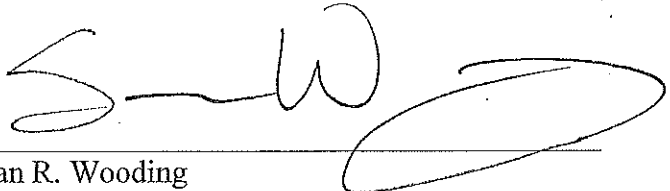
A handwritten signature in black ink, appearing to read 'S-W' followed by a stylized flourish.

Sean R. Wooding, #32450-55
Attorney for Department of
Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail postage prepaid on the 1st day of April, 2016, on the following:

Paul R. Walthers
11565 N. Lambert Ct.
Mooresville, IN 46158


Sean R. Wooding

Sean R. Wooding
Office of Legal Counsel
Department of Natural Resources
402 W. Washington St., Room W295
Indianapolis, IN 46204
317.234.9592
swooding@dnr.in.gov

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

PAUL WALTHERS ,)	Administrative Cause
Petitioner,)	Number: 13-147W
)	
vs.)	
)	
DEPARTMENT OF NATURAL RESOURCES,)	(VTS-DM-3951)
Respondent.)	

**ORDER ON RESPONDENT DNR'S MOTION TO STRIKE PETITIONER'S
UNTIMELY FILED WRITTEN OBJECTIONS**

On April 1, 2016, the Department of Natural Resources (DNR) filed *Respondent DNR's Motion to Strike Petitioner's Untimely Filed Written Objections* ("Motion to Strike").

On March 7, 2016, the Natural Resources Commission ("Commission") Division of Hearings' Administrative Law Judge ("ALJ") for this case issued *Findings of Fact and Conclusions of Law with Nonfinal Order* ("Nonfinal Order") and mailed the Nonfinal Order to the parties and to other interested persons. Also on that date, consistent with Indiana Code § 4-21.5-3-29, the ALJ issued and mailed a *Notice of Filing Findings of Fact and Conclusions of Law with Nonfinal Order* ("Notice of Nonfinal Order") specifying March 28, 2016, as the deadline for filing written objection to the Nonfinal Order.

The objection deadline was determined through the application of Indiana Code § 4-21.5-3-29(d), for decisions by other than decisions issued by the ultimate authority, which states: "To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that: (1) identifies the basis of the objection with reasonable particularity; and (2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner." Fifteen days after March 7, 2016, is March 22, 2016. In accordance with Indiana Code § 4-21.5-3-2(e), because the Notice of Nonfinal Order was served through the United States mail, three days were added to the period commencing upon service of the notice, effectively extending the deadline to March 25, 2016. Because March 25, 2016, was a

state holiday, Good Friday, and that Saturday and then Sunday immediately followed the holiday, in accordance with Indiana Code § 4-21.5-3-2(a), the deadline fell on the next business day, March 28, 2016.

On March 24, 2016, correspondence dated, March 22, 2016, with a greeting identified as "Written Objections", was received by the Commission's Division of Hearings. While the correspondence is unsigned, the closing reflects the typed salutation "Thank you", followed by the typed words "Paul R. Walthers". The Written Objections were hand delivered to the Commission's Division of Hearings by a staff member of the government center's mailroom. Based on the recollection of Legal Analyst Scott Allen, the Written Objections were delivered to the Division of Hearings at approximately 3:30 p.m. (EDT) and were then logged into the Division of Hearings' database, consistent with Division of Hearings procedures. The Written Objections were, in error, originally marked "filed" March 22, 2016, by Legal Analyst Allen, based on the date of the Certified Mail postmark. On March 24, 2016, Legal Analyst Allen then determined that the Written Objections failed to include any Certificate of Service or other indication that the Written Objections had been served on DNR. Based on that observation, Legal Analyst Allen marked out the "Filed" stamp and marked the document "Received" on the date the document was received by the Division of Hearings, March 24, 2016. (The stamp was originally dated March 22, 2016, but was corrected to reflect the actual receipt date of March 24, 2016. This change was made and the change was initialed by Legal Analyst Allen.) Thereafter, the case file was pulled and the Written Objections were placed with the case file into the "in box" of the ALJ, after she left for the day at her standard time, 4:00 p.m.

Standard delivery procedures for Certified Mail delivery to the Division of Hearings is for Certified Mail documents to be delivered to the mailroom in the basement of the Government Center and scanned in at that location. Thereafter, government center mailroom staff separate mail addressed to all state agencies located within the Government Center and place the Certified Mail receipts into individual agencies' post office boxes for retrieval by the specific agency. When the receipt is retrieved by the agency, the mail is signed for by agency staff member and the Certified Mail is released to that agency. The Division of Hearings shares its post office box with the other agencies within the suite, including the Office of Environmental Adjudication and the State Employees Appeals Commission. Certified Mail delivered to the Government Center mailroom after the daily mail pick up time of 10:00 a.m. would, as a standard practice, be placed in the post office box for the agency for pick up on the next business day. Hand delivery by government center mailroom staff is an anomaly.

The standard delivery procedure for mailings by the Division of Hearings is for outgoing mail to be placed in mail slots or bins each working day. Outgoing mail placed in the bins and slots at 2:30 p.m. or earlier, is scheduled to be mailed on that day. Outgoing mail that is placed in the bins and slots after 2:30 p.m., is scheduled to be mailed on the next business day.

On March 28, 2016, the ALJ retrieved the Written Objections and the case file from her “in box”. She reviewed the Written Objections” and prepared an *Entry with Respect to Petitioner, Paul Walthers’ Correspondence Titled “Written Objections”* (“Entry”). The notification included within the Entry is not required under any statute or rule. However, notifications of this type are commonly sent by the Division of Hearings when objections to nonfinal orders are received but not filed for consideration, due to the omission of proof of proper service, to allow a party to submit appropriate documentation and show proper service was made. If a party is able to present proof of service, the “received” date is changed to accurately reflect the date “filed.” The Entry was signed in this case and mailed by First Class U.S. mail, on March 28, 2016, to the parties and to other interested persons.

On March 30, 2016, at 3:07 p.m., an email was received from Lisa Walthers (ldwalthers@yahoo.com). The email states: “This email is in follow-up to an original mailing to the AOPA Committee dated March 22, 2015 via US Postal Service. This email is to the AOPA Committee, Judge Wilson, and Sean Wooding with a copy to Paul Walthers and Lisa Walthers. Please contact me with any questions regarding the email. You may also contact Paul Walthers via cell phone at 317.370.0954. Thank you, Lisa Walthers 703.969.3825.” The email was sent to “NRCAOPA”, “Wooding, Sean R”, and “Wilson, Dawn A”. The email was “cc’d” to “Paul Walthers” and “Lisa Walthers”.

The March 30, 2016, email from Lisa Walthers included a PDF attachment of the Written Objections, a copy of the Notice of Nonfinal Order and enclosures identified as “Exhibits.” The enclosures identified as Exhibits were similar to the enclosures identified as Exhibits to the Written Objections received on March 24, 2016. While the enclosures are identified as Exhibits, the enclosures, in many instances, do not correlate to the Exhibits admitted at the administrative hearing.¹ The attachments to the Written Objections originally received and the copy received by email are not identical. The two sets of attachments are not significantly different.

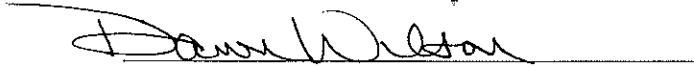
On March 31, 2016, a *Notice of Oral Argument* before the AOPA Committee was issued by the ALJ. The *Notice of Oral Argument* was sent by First Class U.S. Mail to the parties and to interested persons. The *Notice of Oral Argument* was also sent from the NRCAOPA mailbox to the email addresses contained within the email sent by Lisa Walthers on March 30, 2016. The emails were designed to allow the parties, Paul Walthers and DNR, as much time as practical to prepare for oral argument.

DNR’s Motion to Strike, filed on April 1, 2016, is DENIED. Any renewed Motion to Strike at the time of the oral argument will be subject to a determination by the AOPA

¹ Documents admitted as Hearing Exhibits and also identified in the Written Objections are distinguished here. Hearing Exhibit A is a document in three pages. While two pages of this exhibit are submitted with the Written Objections and identified as a part of A1, all three pages are included with the emailed Written Objections. Hearing Exhibit B, in two pages, is included in the Written Objections as Exhibit BB. The third page of Hearing Exhibit C (admitted in six pages), is included with the Written Objections, with different markings on the document. Hearing Exhibit 2, in a single page, is included within the Written Objections with different markings on the document. Hearing Exhibit 3, in four pages, is included within the Written Objections in its entirety, identified as Exhibit D and D1 in the Written Objections.

Committee, as appropriate. For the convenience of the AOPA Committee, the ALJ will ensure that the Motion to Strike and this Order are made available to the AOPA Committee.

Dated: April 4, 2016.



Dawn Wilson
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, Indiana 46204-2739

A copy of the foregoing was sent to the following:

Paul Walthers Sent also by email to: pwalthers@att.net and ldwalthers@yahoo.com
11565 N. Lambert Ct.
Mooresville, IN 46158

Sean Wooding Sent also by email to: SWooding@dnr.IN.gov
Legal Counsel
Department of Natural Resources
Indiana Government Center South
402 West Washington St., Room W295
Indianapolis, Indiana 46204

A copy of the foregoing was sent as a courtesy to persons listed below. A person filing a pleading or documents is not required to serve these persons:

Dave and Jill Byers
6685 Cross Street
Avon, IN 46123

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Avon, IN 46123

Jeanne Coonse
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Lisa Walthers
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DNR Division of Water, Lori Schnaith
DNR Division of Fish and Wildlife, Linnea Petercheff